OGC Has Reviewed

Executive Registry
75-7462/4

P1,58

19 SEP 1975

STATINTL

[redacted]
Central Intelligence Agency
Washington, D.C. 20505

25X1

[redacted]

I wish to acknowledge receipt of your 15 July 1975 memorandum to me concerning administrative practices in the CIA. I am also in receipt of positions from both the General Counsel and the Director of Personnel on matters raised in your communication. I have forwarded the entire matter to the Inspector General with a request that he undertake a review and study of the issues and present me with his findings and recommendations. Upon conclusion of that undertaking, I will be in further communication with you.

Sincerely,

/s/ W. E. Colby

W. E. Colby
Director

Distribution:
Orig - Addressee
1 - DCI
1 - DDCI
1 - DDA
1 - General Counsel
1 - D/Pers
1 - ER
1 - IG w/original basis
O/DDA/JFBlake:der (27 Aug 75)

25X1A

Rewritten: O/ES/[redacted]pgh (2 Sept 75)

25

EXECUTIVE REGISTRY FILE P1,58

IG [redacted]

DD/A 75-4083

STATINTL

[redacted]

Central Intelligence Agency
Washington, D.C. 20505

25X1

[redacted]

I wish to acknowledge receipt of your 15 July 1975 memorandum to me concerning administrative practices in the CIA, and inform you of action I have taken to date. I have requested, as appropriate, positions from both the General Counsel and the Director of Personnel on matters raised in your communication. I am now in receipt of those replies. I have forwarded the entire matter to the Inspector General with a request that he undertake a review and study of the issues and present me with his findings and recommendations. Upon conclusion of that undertaking, I will be in further communication with you.

Sincerely,

W. E. Colby
Director

ORIGINATOR:

25X1A

[redacted]

28 AUG 1975

John F. Blake
Deputy Director
for
Administration

(Date)

Att. to DD/A 75-4014
DD/A Subject
DD/A Chrono DO NOT CIRCULATE
DD/A (JFB Chrono)
DD/A:JFBlake:der (27 August 1975)

Original - Adse
1 - DCI
1 - DDCI
1 - ER
1 - General Counsel
1 - D/OP

CONFIDENTIAL

DD/A 75-4014

28 AUG 1975

MEMORANDUM FOR: Director of Central Intelligence

SUBJECT : Allegations by [redacted] 25
Concerning Administrative Practices in the CIA

25X1A

1. [redacted], a senior officer within the Office of Personnel, communicated with you on 15 July 1975 concerning administrative practices in the CIA. A copy
25X1A of [redacted] memorandum is to be found at Attachment #1. It is my understanding that [redacted] memorandum was not 25
submitted to you upon receipt, but has been held pending receipt of a position paper by the Office of Personnel on
25X1A matters raised by [redacted]

2. There is also attached for your information a memorandum addressed to you by the Director of Personnel responding
25X1A to the issues raised by [redacted] (Attachment #2). With only one exception, I completely endorse the position taken on these allegations.

25X1A 3. One of [redacted] allegations is:

"The overtime regulations of this Agency, established in 1962, are, I believe, in violation of Federal law."

25X1A The Director of Personnel associates himself with the opinion on the legality of our overtime regulations as stated by Mr. [redacted]

4. The Office of General Counsel addressed itself to this matter on 12 December 1974. A copy of the OGC memorandum is at Attachment #3. OGC renders a legal position that the Agency is acting in consonance with the statute in devising and administering the overtime pay policy.

[redacted]

CONFIDENTIAL

25X1A

5. I wish to address myself to two matters concerning [redacted] allegations and the reply by the Director of Personnel. I would urge you to very carefully consider any change in our overtime policy as it pertains, in certain selected cases, to the voluntary contribution of the first eight hours of overtime performed by professional employees. This policy has been in existence since 1962, and is universally accepted as a management device of this Agency. Withdrawal from this policy would cost well in excess of one million dollars per year, and would present management with many complex issues, not the least of which would be innumerable requests to authorize premium pay. The Office of General Counsel opinion states we are in a legally defensive position and, I believe, our advice on this matter must be taken from the Agency's attorneys and not its Personnel Officers.

6. I do not wish to examine [redacted]'s motivations 25X
in submitting his memorandum of 15 July. Two events that were known to him on that date, however, may have been an influencing factor. Prior to that date, the Director of
25X1A Personnel informed [redacted] he was being reassigned to other duties within the Office of Personnel, a decision which evoked very strong protest from [redacted] 25X
secondly, was aware on 15 July that I had directed the Office of Personnel to undertake a review of the position classification policies and procedures of this Agency in an endeavor to ascertain if experiences exist in both the governmental and private sectors unknown to us and which, if studied, could assist us in this admittedly complex and difficult field.

7. I would recommend to you the following course of action:

a. Sign the attached piece of correspondence which I have prepared for your signature addressed to [redacted] and which 25X
acknowledges receipt of his memorandum to you and gives him indication of action taken to date. (This correspondence is at Attachment #4.)

b. You submit the papers addressed to you
25X1A by [redacted] and Janney and my memorandum to the Inspector General and ask him to provide you with his advice and recommendations as well as a final communication from you to [redacted] 25X

CONFIDENTIAL

I would ask of you that, if there should be any differences of opinion between the Inspector General and the Director of Personnel, I be given the opportunity to discuss the matter with you before you adopt your final position.

Signed: John F. Blake

John F. Blake
Deputy Director
for
Administration

4 Atts:
1. [redacted] Memo to DCI, dtd 15 July '75
2. D/OP Memo to DCI, dtd 19 August 1975
3. OGC Memo for Record, dtd 12 Dec. 1974
4. Proposed DCI Response to [redacted]

Distribution:
Original & 1 - DCI w/Atts
1 - DDCI w/atts
1 - ER w/atts
1 - General Counsel w/atts
1 - D/Pers w/atts

CONFIDENTIAL

EXECUTIVE SECRETARIAT

Routing Slip

TO:		ACTION	INFO	DATE	INITIAL
1	DCI				
2	DDCI				
3	S/MC				
4	DDS&T				
5	DDI				
6	DDA	✓			
7	DDO				
8	D/DCI/IC				
9	D/DCI/NIO				
10	GC				
11	LC				
12	IG				
13	Compt				
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15	D/S				
16	DTR				
17	Asst/DCI				
18	AO/DCI				
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	SUSPENSE				

Date

Remarks:

STATINTL For review & comment to DCI

[redacted]

P/S handle with some degree of PRIORITY

[redacted]

STATINTL

363/ (1-73)

16 July
Date

DD/A 75-3536

19 JUL 1975

75-7462

MEMORANDUM FOR: William E. Colby, Director of Central Intelligence

SUBJECT : Administrative Practices in the CIA

1. There are administrative practices in the CIA which I believe are in violation of Federal laws or regulations, or are unconscionable. I have attempted to secure corrections of these practices through administrative channels without success.

2. I have, therefore, written this report.

3. I am the Chief of the Position Management and Compensation Division, a position I have held for approximately eight years. I have worked in this division and predecessor organizations for over twenty years. I am familiar with position grading actions that have taken place over this time which have resulted in improper escalation of the grade and pay structure. Many of the upgrading actions were ordered by administrative officials with full knowledge of the facts and over objections of the Position Management organization. I believe there is a serious question as to the validity of these levels.

4. There is present interest in decentralization of position classification functions, which would permit a still greater escalation of the grade and pay structure. I believe that action should be taken to prevent such decentralization and to correct present errors.

5. The overtime regulations of this Agency, established in 1962, are, I believe, in violation of Federal law. I attempted to correct these regulations by a report I submitted through administrative channels on June 6, 1974. Nothing has been done.

6. The independent contracting system in the Agency, I believe, is a further violation of law. The practice this Agency follows is inconsistent with that followed in other agencies and inconsistent with the duties of many such independent contractors.

7. I have not taken this course of writing you directly without long and careful thought. I have become convinced, over many years, that no improvement and no correction of errors will ever take place without direction from the top.

STATINTL

Chief
Position Management & Compensation Division

Attachment

ADMINISTRATIVE PRACTICES IN THE CENTRAL INTELLIGENCE AGENCY

Problem

1. The grade structure of the Central Intelligence Agency is excessively high in comparison to levels existing elsewhere in the government for comparable work. This is contrary to the principle of equal pay for substantially equal work included in the U.S. Code Title 5, Section 5101.

2. The overtime and premium pay regulations and practices of the Agency are contrary to the requirements of Title 5 of the U.S. Code, Section 5541 to 5545.

3. Individuals designated as Independent Contractors in the Agency appear in many cases to be employees under the requirements of Social Security and Internal Revenue legislation requiring the deduction of Social Security taxes.

Background Data

A. Position and Grade Structure

1. The position classification system of the Central Intelligence Agency is based on the general government system applied in other agencies. Before the Classification Act of 1949 the Agency was under the review and control of the Civil Service Commission. Upon the enactment of this law, which exempted the Agency, the Agency agreed to follow the government system voluntarily without external control.

2. Initially the grade structure established was comparable to those in other Agencies of equivalent functional responsibility and for a number of years, Classification Personnel frequently made comparisons with other agencies to insure comparable levels. In succeeding years, pressures from senior officials resulted in a gradual elevation of the structure. The primary emphasis of the Office of Personnel was to provide service to operating components. Efforts to hold grades to reasonable levels were challenged on the ground that service was not being provided. Since no external controls were imposed on the Agency, Classification Personnel were subject to pressures both from operating officials and from officials within the administrative structure. As a result, it was not possible for the Position Management Organization to control the escalation.

B. Overtime and Premium Pay

The present overtime and premium pay regulations of the Agency were established about 1962 and have remained substantially unchanged. The basic principle of these regulations is to require most employees to work eight hours of overtime without compensation before being compensated for any additional overtime, to ignore the requirement that all hours over eight in one day are overtime, and that all hours over forty in one week are overtime. These requirements are not consistent with the provisions of the U.S. Code.

C. Independent Contractors

Independent Contractors can be defined as individuals who receive a specified contract sum for providing certain services. In many cases in the Agency, Independent Contractors perform the same duties as Staff employees and are determined to be Independent Contractors from a statement in the contract. The purpose of the contract appears to be to avoid requirements for deducting taxes and Social Security and providing employee benefits. It appears that such employment may be contrary to Internal Revenue or Social Security laws.

Analysis of the Problem

A. Position Grade Structure

1. The grade structure of the Agency has resulted in part from the establishment of positions necessary to recognize the level of functional responsibility. It has resulted in part, also, from the wish to accommodate individuals who have been promoted without regard to the levels of their performance by the Career Service System. This System is composed of boards in the various offices whose functions include the assignment and promotion of employees by so-called competitive evaluation, in many cases without consideration of the levels of the positions they occupy or the levels of work they perform. In cases where they are assigned to positions below their grade level, there is often pressure to upgrade the positions to accommodate their grades and avoid personal rank assignment. The views of supervisors have frequently not been considered in promotion of employees.

2. As a result of the continuing pressure for upgrading of positions, grades of positions have changed with little change in position responsibility, as follows:

GS-11 and GS-12 positions have advanced to GS-13 and GS-14.

GS-12 and GS-13 positions have advanced to GS-14, GS-15, and GS-16.

GS-16's have become GS-17's or GS-18's.

3. The classification of higher grades has in some cases produced an inverse pyramid with more higher grades than lower grades or as it is sometimes called--more Chiefs than Indians. Efforts by the Position Management Organization to hold down grades or reduce them to reasonable levels have been ignored or overruled.

4. The results show, I believe, that Agency positions in many cases are overgraded one or two grades above elsewhere.

5. Agency officials are not satisfied with this grade difference over other Agencies. They continue to want more. They will not accept determinations that Agency grades are higher than elsewhere. In some cases they become angry when their grades are not raised; they threaten Position Management Personnel with being responsible for hamstringing their operations by forcing employees to resign to accept higher pay in industry. I believe this is partly the result of the inbred nature of the Agency--the emphasis on the belief that Agency employees are smarter than other people, more creative, more dynamic. Strange as this may seem, such beliefs have been pronounced by personnel officers.

6. Partly, I think, it is the result of lack of control, unwillingness on the part of senior officials to rock the boat. Office heads should be told to live with the grades they have and count themselves lucky. But they are not. There is interest at present in abolishing grade controls and giving office heads authority to set their own levels with only a budgetary control.

7. Deputy Undersecretary Crockett of the State Department made such a delegation of classification authority to major organizations of the Department of State in 1962. As a result, from 1962 to February 1971, there was a general escalation of levels in the Department of State which was completely inconsistent with levels of responsibility. An investigation was conducted and in 1971 position classification was again recentralized and efforts began to correct the mistakes.

8. Surveys were conducted which resulted in reductions of class levels at FS01 and FS02 by 23% and FS03 by 6%. These are the higher pay levels of the Department of State, equivalent to the supergrade and GS-15 levels. The reductions were modest, intended to reduce personnel impact. The CIA has made much progress in the same direction. Apart from the fact that money is being wasted on such profligacy, the government and the general public deserve more honest treatment.

B. Overtime Practice

1. The overtime regulations were designed to discourage the use of overtime in the Agency. This was done about 1962 and was accomplished by arbitrarily changing the provisions of law to provide that certain types of overtime did not qualify for overtime pay. Included were the first eight hours of overtime performed by professional employees, all hours over eight in one day, and all hours over forty in one week if the two week pay period included no more than eighty hours of duty. These regulations are contrary to Title 5 of the U.S. Code.

2. The same result could have been accomplished by requiring supervisors to avoid authorized or directed overtime, without a violation of law.

3. At the time the present regulations were established they were objected to by PMCD on the ground that they were inconsistent with the Federal law, but the General Counsel's office determined that the Agency did not have to follow the Federal law (Per P.L. 110).

4. I submitted a report on the overtime practice in the Agency with a recommendation for changing overtime regulations to conform to general Federal regulations on June 6, 1974. The recommendation has never been approved (copy attached).

C. Independent Contractors

Under Federal law, Independent Contractors are individuals who undertake to provide certain service for a stipulated sum of money. In this Agency, however, Independent Contractors who are retired annuitants may be hired at a daily rate of pay which is equal to the rate of pay they received as employees and they may work in the Agency performing duties comparable to those performed as employees. A limitation of $36,000 per year is placed on what these individuals may receive. This limitation appears to indicate doubts on the part of Agency officials as to whether they are actually employees as the $36,000 limitation of Title 5 of the U.S. Code applies only to employees. It does not apply to an Independent Contractor who contracts to perform a certain service and is not an employee. It is as though the Agency follows the Alice in Wonderland system of defining Independent Contractors i.e., an Independent Contractor is just what we say it is, no more, no less.

PMCD Position

1. I believe that these errors should be corrected. This can be

done by issuing regulations to correct the overtime and independent contracting practices and by giving the Position Management and Compensation Division the authority to make a complete review of positions and take corrective action, possibly spaced over a period of time to avoid downgrading actions.

2. Promotions should be based on performance in positions legitimately graded, not on speculative potential as determined by a Career Service Board. Promotions should be under the control of supervisors who are the only individuals qualified to judge work performance and employees' grades should be limited to the grades of their positions.

Recommendations

1. That a regulation be issued to make overtime rules consistent with the Federal law and to correct the present practices relating to Independent Contractors.

2. That an investigation be directed of the grade structure of this Agency in comparison with other Agencies and that corrective action be taken.

3. That except for unusual cases, promotions to and within upper-grade and supergrade levels be frozen until the validity of those levels has been established.

STATINTL

[redacted]

Chief
Position Management and Compensation Division

6 JUN 1974

MEMORANDUM FOR: Deputy Director for Management and Services

SUBJECT : Overtime and Premium Pay Policy

1. Action Requested: Change in overtime and premium pay policy and regulations to conform to the requirements of Federal Law.

2. Basic Data:

Federal Laws

Title 5 U.S. Code, Subchapter V establishes the basic requirements for overtime for general schedule employees. These are as follows:

Section 5542: Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work. (NOTE: The provision designating work in excess of 8 hours in a day as overtime was originally included in Federal Law in Public Law 89-504, 18 July 1966.)

Section 5543: Compensatory time off

(a) The head of an agency may

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work.

Section 5545: Annual premium pay

(c) the head of an agency, with the approval of the Civil Service Commission, may provide that

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regular scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than ten per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.

(The Civil Service Commission has established the following rules for determining the amount of annual premium pay:

1. An average of at least three but not more than five hours per week of irregular or occasional overtime work - 10%.

2. An average of over five but not more than seven hours per week of irregular or occasional overtime work - 15%.

3. An average of over seven but not more than nine hours per week of irregular or occasional overtime work - 20%.

4. An average of over nine hours per week of irregular or occasional overtime work - 25%.)

Fair Labor Standards Act Amendments of 1974
(P.L. 93-259, April 8, 1974)

Effective May 1, 1974, except for certain employees in executive, administrative, and professional positions, and those in foreign areas, all Federal employees are entitled to overtime pay for all work which the employer "suffers or permits" to be done. The Civil Service Commission will issue a tentative list of the exempt employees by April 26. Most employees at GS-11 and below will be covered under this law.

The Civil Service Commission, as the enforcement agency, will be responsible for post audit of overtime pay administration to determine violations and order corrective action.

Agency Regulations

A. Overtime

The Agency regulations on overtime and annual premium pay follow the Federal Law in some respects. However, points of substantial difference are:

1. Employees, GS-12 through GS-14, may receive overtime payments or compensatory time in lieu thereof for directed overtime work in excess of 48 hours in a given work week.

2. No overtime payment or compensatory time will be granted for hours of duty between 40 and 48 in a given work week unless such hours represent directed work on,

a. a position which requires substantial amounts of overtime work on a continuing basis, the productivity of which is predominantly measurable in units of production or hours of duty performed;

b. on any day during a work period of seven or more consecutive days, or,

c. a second job, the duties of which are substantially unrelated to the primary assignment.

(The requirement that 8 hours of work be contributed without pay is inconsistent with the Federal Law and with good management principles.)

The Agency regulation also provides for the substitution of compensatory time in place of regular overtime either on the request of employees at GS-11 and below or by

direction of the supervisor for employees in higher grades even though the Federal Law provides for such substitution only in the case of irregular or occasional overtime work.

The Agency regulation has never provided that overtime pay is required for all work in excess of eight hours in a day. There are a number of nonstandard work schedules in the Agency now utilizing 12 hour work days for which under Federal Law four hours of overtime pay are required for each 12 hour day. Other agencies which have tried similar schedules have been required to pay overtime. Compensatory time was not permitted.

The Agency overtime regulation has been in substantially the same form since March 1962. During this period the Agency regulation has required the normal sacrifice of eight hours of overtime compensation for employees at GS-12 through GS-14.

B. Annual Premium Pay

The provision of the Agency regulation covering annual premium pay is substantially the same as that established by the Federal Law.

Application of Agency Compensation Policy

Agency professional employees at GS-12 and above have been expected and encouraged to work overtime whenever they determined that such work was necessary or when directed, in nearly all cases without any form of compensation. Agency duty officers have worked in Headquarters offices on Saturday regularly for a dozen years or more without any form of compensation. The expressed view of many high officials has been that Agency professionals should be glad to perform such "discretionary" overtime without additional pay, since they are well compensated by their regular salaries. This view is in disregard of the fact that their regular salaries are based on a 40-hour week.

Agency officials having authority to approve such overtime have been aware that it was being performed and approved of it.

Failure to formally authorize or approve overtime where approving officials were aware of and agreed to performance has been held by the Court of Claims to require payment.

The Court of Claims in Anderson v. United States 136 Ct. Cl 365 (1956) makes the point that "The Commissioner of Customs, as the authorized deputy of the Secretary of the Treasury, had authority under the statute

to order or approve overtime. While he did not order the work to be performed, he certainly knew and approved of its being done. . . . In withholding orders for the approval of overtime, the Commissioner intended to withhold compensation for services performed. . ." The Court directed payment to the employee.

The Court of Claims in Rapp v. United States, 340 F. 2d 635, 167 Ct. Cl 852 (1964) decided further "Where plaintiffs were not only induced to perform duty officer tours but were given reasonable and understandable grounds for fearing they might jeopardize their positions if they did not do so" they were entitled to compensation.

Many CIA professionals have performed Saturday duty tours without question and without overtime pay for many years for this reason. It seems clear that the fear of reprisal is a strong deterrent to employee claims for overtime.

With regard to annual premium pay, while the Agency regulation is substantially in agreement with the Federal Personnel Manual, we have deviated from the established percentage requirements for pay. In certain cases it was decided, for administrative reasons, to pay a lesser percentage rate than established. The legality of these actions is questionable.

Applicability of Federal Law to the CIA

The question as to whether the Federal Premium Pay law applies to the CIA has apparently never been ruled on by the Comptroller General or the Courts. The U.S. Code Title 5, Subchapter V on Premium Pay, however, provides for no exclusion of the Agency. While this may not be conclusive, it should be noted that Chapter 51, Title 5, on Classification of Positions, does provide for exclusion of the Agency. The absence of a specific exclusion for application of Premium Pay provisions to the Agency is evidence of intent that the Agency should be covered.

3. Staff Position

The provision of the Agency regulation limiting compensation for the first eight hours of overtime to employees at GS-12 through GS-14 predominantly in production jobs is prejudicial to the rights of employees in jobs not of a production nature who may be equally industrious and conscientious. Further, it is inconsistent with the annual premium pay provision which does not provide for ignoring the first eight hours of overtime.

The primary reason for the Agency regulation may have been to discourage the use of excessive overtime but the result was to avoid payment for overtime while benefiting from the extra work performed. This result is not defensible in principle. FOIAB5 FOIAB5

FOIAB5 [redacted] The Civil Service Commission's exception of the Agency from its overtime regulations lent additional support to this position. FOIAB5

FOIAB5 [redacted] The Congress now seems more concerned with employees' rights than it did many years ago. Employee organizations are more vociferous. Further, it is difficult to explain to employees why in the CIA one gives eight hours of free overtime to the Government which he is not required to do elsewhere. This cannot be justified on security grounds.

From the tone of decisions of the Court of Claims on the right of Federal employees to overtime compensation, it seems probable that any claim by an Agency employee supported by evidence of overtime work with tacit approval of officials would be decided in favor of the employee. Such a decision might require the Agency to compensate other employees so deprived of overtime compensation.

Therefore, consideration should be given to bringing all forms of Agency premium pay into line with the general Federal Law. Consideration should also be given to reviewing the extent to which employees who have not been compensated for overtime should be paid.

4. Recommendation:

a. That a committee be established in the Office of Personnel to review the overtime pay policies and regulations and revise to bring into agreement with the Federal Law.

b. That the committee determine practicable limitations to set on the authorization of overtime.

c. That the committee consider and make recommendations as to the extent to which employees who have worked overtime without compensation under the present regulations should be compensated.

(Signed) F. W. M. Janney

F. W. M. Janney
Director of Personnel

APPROVED /s/ Harold L. Brownman * 11 JUN 1974
Date

DISAPPROVED _____ _____
Date

Distribution:
Orig - Adse (Ret to D/Pers)
2 - DD/M&S
1 - D/Pers
1 - OP/PMCD

ATINTL

OP/PMCD/ [redacted] n (22 Apr 74)
Rewritte [redacted] (28 May 74)

* Pending OGC concurs and agrees to assist in the study.

AUG 25 5 54 PM '75

ER

AUG 27 [illegible] '75

ER

Approved For Release 2006/01/03 : CIA-RDP80B01086A000900110006-6

CONFIDENTIAL

DD/A 75-1990

Executive Registry
75-7462/1

19 AUG 1975

MEMORANDUM FOR: Director of Central Intelligence

THROUGH : Deputy Director for Administration

SUBJECT : Allegations Relative to Certain Administrative Practices in the Central Intelligence Agency

REFERENCE : Memo to DCI from C/PMCD/OP dtd 15 Jul 75; Subject: Administrative Practices in the CIA

25X1A

1. We have reviewed the referent memorandum prepared by [redacted] and have prepared comments (Tab A) on the substance of Mr. [redacted] statements leading to his concluding allegations that:

25X1

a. The grade structure of the Central Intelligence Agency is excessively high in comparison to levels existing elsewhere in the government for comparable work, contrary to the principle of equal pay for substantially equal work included in the U. S. Code Title 5, Section 5101;

b. The overtime and premium pay regulations and practices of the Agency are contrary to the requirements of Title 5 of the U. S. Code, Section 5541 to 5545;

c. The independant contracting system in CIA is a violation of the law in that the practice this Agency follows is inconsistent with that followed in other agencies and inconsistent with the duties of many such independent contractors.

2. General Comments:

25X1A

a. [redacted] has served his entire Agency career of 22 years with the Position Management and Classification element of the Office of Personnel. He was appointed as Chief of the Position Management and Compensation Division on 29 September 1967 and served in that assignment until 3 August 1975, when he was reassigned. In this capacity he has been regarded as a man of integrity and an "expert" in the technical aspects of position classification, confident of the validity of his judgments and frank in expressing his opinions.

CONFIDENTIAL [redacted]

During his tenure as Chief, PMCD, [redacted] conducted position classification audits and approved changes in grade levels of positions based upon his own judgment and those of the position classification officers under his supervision. When his judgments on grade determinations are appealed by Heads of Operating Components, these issues are referred to the Director of Personnel for final adjudication based on a full review of PMCD's findings against the evidence put forward by the operating officials concerned. Such appeals are relatively infrequent when compared to the 3,000 or so positions that are reviewed by PMCD classifiers each year. For the past eight years, the Agency position structure and grade levels, therefore, essentially have been based upon the recommendations of the position classifiers assigned to PMCD, with final approval by [redacted] as Chief, PMCD -- a fact which makes his present allegations all the more puzzling.

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25X1A

The role of the Chief, PMCD and the position classifiers is not an easy or popular one in terms of fulfilling their responsibility to adhere to objective criteria, to reduce or at least maintain Agency position grade averages and control escalation of the number of GS-14 and above positions. Operating component managers with whom PMCD classifiers deal have strong convictions regarding the importance of their functions, the quality of their workforce and, not unexpectedly, press for position grade levels which they believe are appropriate to recognize duties performed.

Position classification is less a science than an art in terms of the review and analysis of substantive facts, subjective interpretation of information developed in discussion, negotiation with operating officials, and final determination based upon all the facts and information available in the very real context of maintaining a quality workforce to fulfill the requirements and responsibilities of the Agency. Moreover, Agency management has long recognized that position classification in CIA must take into consideration certain characteristics of Agency employment, stated in [redacted] apparently has had difficulty in accepting these basic concepts of Agency employment as he does in accepting the competitive evaluation and promotion system -- a key ingredient of the Agency's personnel management system.

25X1A

b. In his memorandum [redacted] has presented three conclusions of what he construes as improper administrative practices, but in the substance of his memorandum he has not provided supportive evidence, comparative statistics nor analyses to substantiate most of his allegations.

c. We have reviewed his various statements and have presented our comments on the specific sub-paragraphs contained in his memorandum as related to each of his allegations.

3. Based upon our review of data available, we conclude that:

a. The evidence does not substantiate the allegation that the grade structure of the CIA is excessively high in comparison to levels existing elsewhere in government for comparable work;

FOIAB5

[redacted]

c. In our opinion, the Office of Personnel, with the assistance of the Office of General Counsel, has over the years properly categorized an individual under contract as an employee or independent contractor. While honest mistakes may have been made, there is no evidence to indicate an abuse of the personal services contracting function.

4. In the concluding paragraph of his memorandum, [redacted] recommends that a regulation be issued to make overtime rules consistent with the Federal law and to correct the present practices relating to independent contractors; that an investigation be directed of the grade structure of this Agency in comparison with other agencies and that corrective action be taken; and that except for unusual cases, promotions to and within upper-grade and supergrade levels be frozen until the validity of those levels has been established. Of these, we believe that action should be considered only on the matter of the Agency's overtime policy and practices.

/s/ F.W.M. Janney

F. W. M. Janney
Director of Personnel

Atts

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25X1A D/Pers: [redacted] :bkf (18 Aug 75)

Tab A

Review and Comments on Allegations
Relative to Certain Administrative Practices
in the Central Intelligence Agency

1. SUMMARY ALLEGATION ON GRADE STRUCTURE:

"The grade structure of the Central Intelligence Agency is excessively high in comparison to levels existing elsewhere in the government for comparable work. This is contrary to the principle of equal pay for substantially equal work included in the U. S. Code Title 5, Section 5101."

25X1A a. [redacted] Assertion: "The position classification system of the Central Intelligence Agency is based on the general government system applied in other agencies. Before the Classification Act of 1949 the Agency was under the review and control of the Civil Service Commission. Upon the enactment of this law, which exempted the Agency, the Agency agreed to follow the government system voluntarily without external control."

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FOIAB5 [redacted]

[redacted] In addition, however, to the classical position evaluation principles prescribed by the Civil Service Commission, Agency policy as outlined in [redacted] includes the consideration of such factors as:

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(1) the Agency-wide requirement to exercise the utmost vigilance, on the job and in private life, to protect the national security, the security of Agency activities and the safety of all persons engaged in intelligence operations;

(2) the requirement for unique skills and for the assumption of additional responsibilities when the normal division of labor is precluded by compartmentation for security reasons;

(3) the requirement for unusual ingenuity, creativeness, and alertness brought about by changing doctrines and procedures for intelligence operations or support and the frequent shifts of duties stemming from such changes;

(4) the need to accept a degree of personal anonymity in the interest of the U. S. Government;

(5) recognition of the fact that comparability with salaries outside the Government should result in maintaining stability in position grades unless a significant change in the work being performed can be demonstrated.

While Civil Service concepts and principles as applied to other Federal agencies under Civil Service Commission purview form a basis for Agency position evaluation, the additional factors peculiar to employment with CIA are valid and, where applicable, may result, justifiably, in higher position grade levels than found in other agencies where these considerations do not pertain.

25X1A b. [redacted] Assertion: "Initially the grade structure established was comparable to those in other Agencies of equivalent functional responsibility and for a number of years, Classification Personnel frequently made comparisons with other agencies to insure comparable levels. In succeeding years, pressures from senior officials resulted in a gradual elevation of the structure. The primary emphasis of the Office of Personnel was to provide service to operating components. Efforts to hold grades to reasonable levels were challenged on the ground that service was not being provided. Since no external controls were imposed on the Agency, Classification Personnel were subject to pressures both from operating officials and from officials within the administrative structure. As a result, it was not possible for the Position Management Organization to control the escalation."

Comment: In the conduct of Agency position classification reviews for the purpose of determining the appropriate and equitable grade levels, the PMCD classifiers are, and always have been, expected to make comparisons with similar positions elsewhere in the government, the private sector, and internally within other components of the Agency.

CIA, like most other Federal agencies, has experienced increases in the average grade level of our position structure over a period of the past

few years. Such increases are not atypical in organizations which are reducing in size. For the period FY 1968 through FY 1975, the Agency has eliminated approximately [redacted] positions. The elimination of lower graded clerical, technical and junior level professional positions and the need for an increased proportion of higher graded professional positions requiring composites of qualifications is a typical phenomena within agencies experiencing successive annual reductions in ceiling. Added factors in pushing up average position grades are the increase in need for high graded scientific and technical expertise to meet current requirements and the increase in automated system in lieu of manual procedures. These factors have all been cited by the Civil Service Commission in their reports on grade trends of Federal civilian employment in predicting continuing trends toward increasing grade levels. For some years Agency internal controls have been maintained to stabilize and, where possible, to reduce the average grade of our position structure and the number of positions at grade GS-14 and above. It is worthy of note that in 1965 OMB established specific controls on average grade and on the number of upper-level positions, i.e., GS-14 and above. These controls were no longer required in 1968. Yet, and consciously as a means of controlling average grade and upper-level positions, the Agency continued these controls, and they still remain in effect. Requests for increases which cannot be accommodated by decreases elsewhere must be completely justified and approved by the Director of Personnel with the concurrence of the Comptroller. Comparisons between CIA's average position grade levels with other Federal agencies must include recognition that the position and employee grades of other departments are essentially the same while CIA's position grades are consistently higher than our employee grades. The Agency's average position and employee grade patterns for the end of Fiscal Year 1965 and Fiscal Years 1970 through 1975 are as follows:

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Average position grades as of 30 June 1975 for other U. S. Government agencies with comparable functions are as follows:

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c. [redacted] Assertion: "The grade structure of the Agency has resulted in part from the establishment of positions necessary to recognize the level of functional responsibility. It has resulted in part, also, from the wish to accommodate individuals who have been promoted without regard to the levels of their performance by the Career Service System. This System is composed of boards in the various offices whose functions include the assignment and promotion of employees by so-called competitive evaluation, in many cases without consideration of the levels of the positions they occupy or the levels of work they perform. In cases where they are assigned to positions below their grade level, there is often pressure to upgrade the positions to accommodate their grades and avoid personal rank assignment. The views of supervisors have frequently not been considered in promotion of employees."

Comment: The position grade structure of the Agency is essentially the product of position surveys and audits conducted by PMCD classifiers and the decisions of Chief, PMCD only. A relatively few of the position grades have been approved by the Director of Personnel -- on appeal -- and on the basis of an analysis of the recommendations put forward by Chief, PMCD and the evidence presented by Deputy Directors or Office (Division in DDO) Heads. The Agency utilizes a Career Service Competitive Evaluation and Promotion System which can be considered to be directed at "rank in the man" with consideration of "rank in the position." This system parallels the Department of State's Foreign Service System. The basic Civil Service System which applies to most other Federal agencies is essentially a "rank in the position" approach whereby employees compete for higher graded position assignments which, when effected, result in promotion. The Agency Competitive Evaluation and Promotion System authorizes Heads of Career Services and Sub-Career Services to promote and assign their personnel both above (Personal Rank Assignment) and below the level of the adjudicated grade

of their position of assignment. Agency policy does not require that Heads of Career Services consult the view of supervisors relative to the promotion of employees. Some Sub-Career Services do, some do not. It is true that the PMCD classifiers frequently encounter arguments from Heads of Operating Components that position upgradings are needed within a Sub-Career Service to provide promotion headroom for various grade groups within that Sub-Career Group.

In December 1971 the Agency's Career Service Competitive Evaluation and Promotion System was reviewed by senior representatives of the Civil Service Commission in connection with the Commission's review of CIA's request to set up a system to facilitate the movement of CIA personnel into the competitive service. In a letter to the Director, OMB (Tab B), the Chairman, Civil Service Commission stated that: "The on-site observations of a Commission team assure us that the operations of the CIA personnel system are consistent with merit principles."

25X1A d. [redacted] "As a result of the continuing pressure for upgrading of positions, grades of positions have changed with little change in position responsibility, as follows:

GS-11 and GS-12 positions have advanced to GS-13 and GS-14.

GS-12 and GS-13 positions have advanced to GS-14, GS-15, and GS-16.

GS-16's have become GS-17's or GS-18's."

Comment: The distribution of approved graded positions on the Agency's staffing complements for sample comparative Fiscal Years 1970, 1972, 1974, 1975 and 30 April 1975 are as follows:

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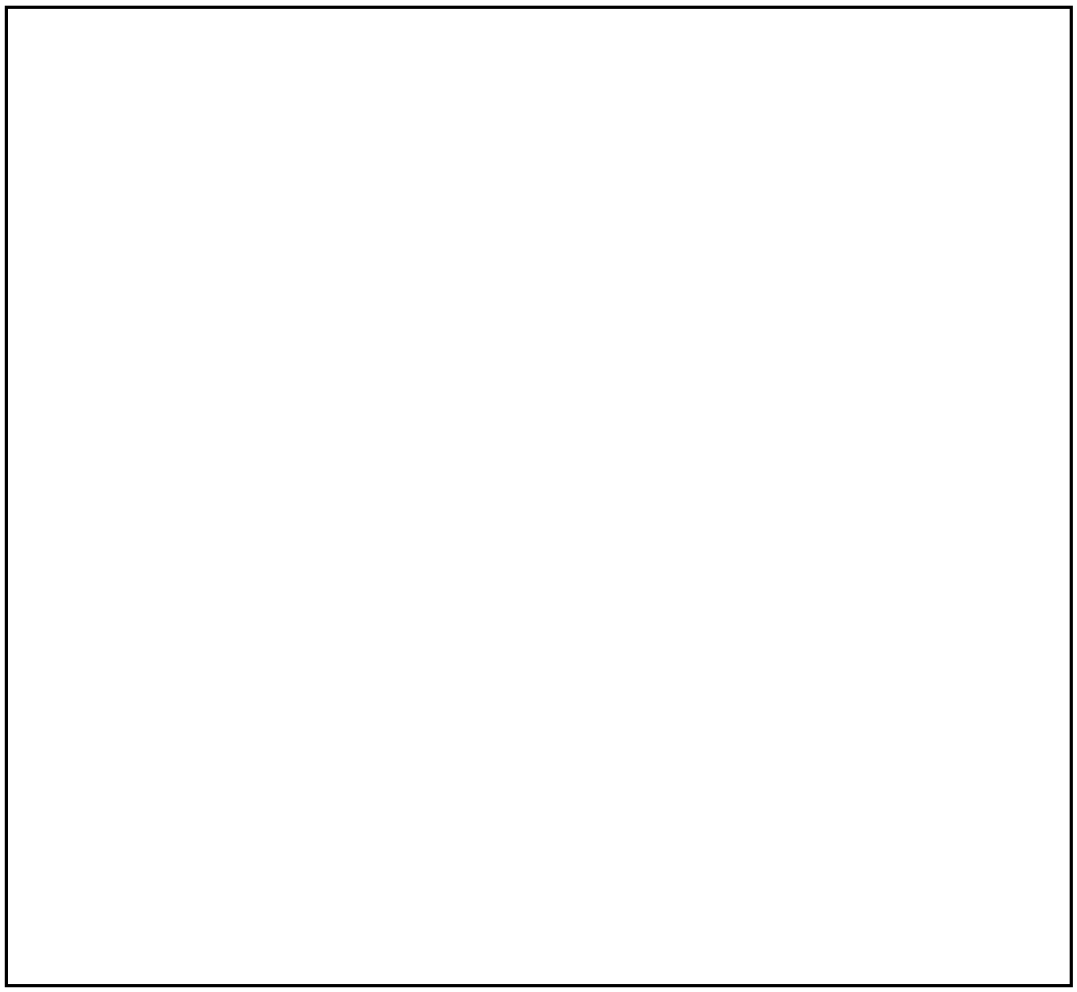
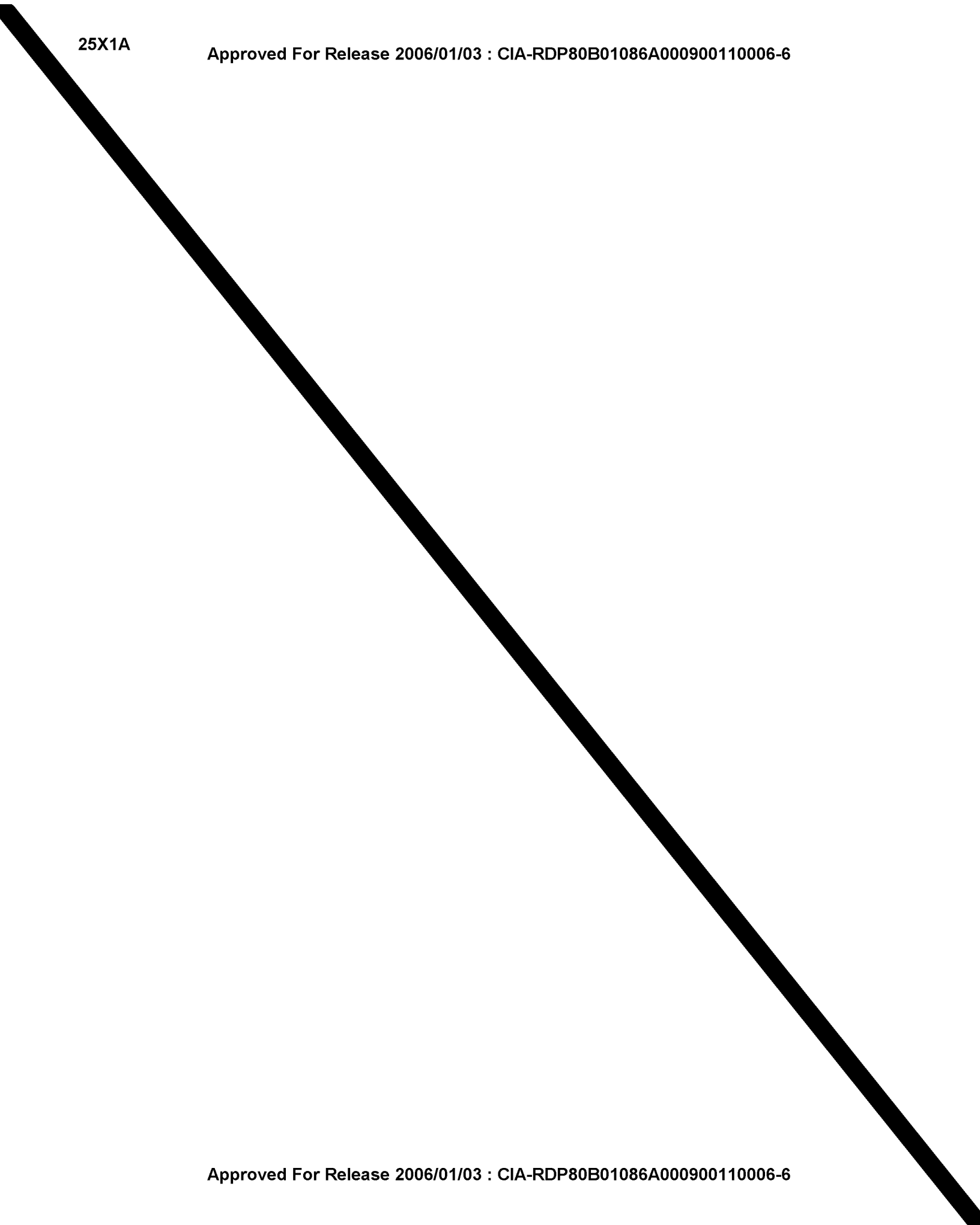


25X1A e. [redacted] "The classification of higher grades has in some cases produced an inverse pyramid with more higher grades than lower grades or as it is sometimes called -- more Chiefs than Indians. Efforts by the Position Management Organization to hold down grades or reduce them to reasonable levels have been ignored or overruled.

"The results show, I believe, that Agency positions in many cases are overgraded one or two grades above elsewhere."

Comment: The Agency's position profile as of 30 June 1975 is as follows:



Approved For Release 2006/01/03 : CIA-RDP80B01086A000900110006-6

Please note that the above comparative data was provided by 25X1A [redacted] in conjunction with other data in the Agency's successful justification of our supergrade ceiling for FY 1975 when questioned by the Office of Management and Budget.

25X1A f. [redacted] Assertion: "Agency officials are not satisfied with this grade difference over other agencies. They continue to want more. They will not accept determinations that Agency grades are higher than elsewhere. In some cases they become angry when their grades are not raised; they threaten Position Management Personnel with being responsible for hamstringing their operations by forcing employees to resign to accept higher pay in industry. I believe this is partly the result of the inbred nature of the Agency -- the emphasis on the belief that Agency employees are smarter than other people, more creative, more dynamic. Strange as this may seem, such beliefs have been pronounced by personnel officers."

25X1A Comment: PMCD classifiers frequently encounter the situations cited by [redacted] Some senior operating component managers do question the authority of the Office of Personnel to conduct position surveys and adjudicate grade levels. Unfortunately, this is part of the "lot" of position classifiers elsewhere in Government and private industry and is prominently cited in the literature on this aspect of the personnel management function. Regarding the caliber of Agency employees, we have always strived to maintain particularly high standards in the quality of our employees. We believe that these standards have been maintained.

25X1A g. [redacted] Assertion: "Partly, I think, it is the result of lack of control, unwillingness on the part of senior officials to rock the boat. Office heads should be told to live with the grades they have and count themselves lucky. But they are not. There is interest at present in abolishing grade controls and giving office heads authority to set their own levels with only a budgetary control."

25X1A Comment: This is simply an opinion on the part of [redacted] which we do not share. At the present time, the Office of Personnel is participating in a comprehensive study by [redacted] and two other retirees of the Position Management and Classification function within the Agency, aimed at

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developing improvements in the effectiveness of the system. The abolition of grade controls and giving Office Heads authority to set their own levels with only a budgetary control is not, to our knowledge, being considered by senior management.

25X1A [redacted] "Deputy Undersecretary Crockett of the State Department made such a delegation of classification authority to major organizations of the Department of State in 1962. As a result, from 1962 to February 1971, there was a general escalation of levels in the Department of State which was completely inconsistent with levels of responsibility. An investigation was conducted and in 1971 position classification was again recentralized and efforts began to correct the mistakes.

"Surveys were conducted which resulted in reductions of class levels at FS01 and FS02 by 23% and FS03 by 6%. These are the higher pay levels of the Department of State, equivalent to the supergrade and GS-15 levels. The reductions were modest, intended to reduce personnel impact. The CIA has made much progress in the same direction. Apart from the fact that money is being wasted on such profligacy, the government and the general public deserve more honest treatment."

25X1A Comment: [redacted] statement is factual as regards the results of decentralization of position classification authority to the Bureau Chiefs in the Department of State. 25X1A [redacted] statement that "the CIA has made much progress in the same direction" appears to be out of context with his preceding statement and does not provide a basis for comment.

2. SUMMARY ALLEGATION ON OVERTIME:

"The overtime and premium pay regulations and practices of the Agency are contrary to the requirements of Title 5 of the U. S. Code, Section 5541 to 5545."

25X1A [redacted] Assertions:

"The overtime regulations were designed to discourage the use of overtime in the Agency. This was done about 1962 and was accomplished by arbitrarily changing the provisions of law to provide that certain types of overtime did not qualify for

overtime pay. Included were the first eight hours of overtime performed by professional employees, all hours over eight in one day, and all hours over forty in one week if the two week pay period included no more than eighty hours of duty. These regulations are contrary to Title 5 of the U. S. Code.

"The same result could have been accomplished by requiring supervisors to avoid authorized or directed overtime, without a violation of law.

"At the time the present regulations were established they were objected to by PMCD on the ground that they were inconsistent with the Federal law, but the General Counsel's office determined that the Agency did not have to follow the Federal law (per P. L. 110).

"I submitted a report on the overtime practice in the Agency with a recommendation for changing overtime regulations to conform to general Federal regulations on June 6, 1974. The recommendation has never been approved (copy attached)."

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Comment: We share [redacted] concern about the Agency's current policy and practices relative to the non-payment of compensation for overtime performed by certain employees grade GS-12 and above. [redacted]

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[redacted]

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[redacted] The 6 June 1974 memorandum (Tab C) which [redacted] refers to was submitted to Mr. Harold L. Brownman, the Deputy Director for Management and Services, over the Director of Personnel's signature. As reflected on that memorandum, Mr. Brownman approved the recommendations but with the condition "providing OGC concurs and agrees to assist in the study." The Director of Personnel established a committee to review the matter. [redacted]

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[redacted] We continue to believe that Agency policies and practices regarding overtime payment are questionable and should be reexamined.

3. SUMMARY ALLEGATION ON INDEPENDENT CONTRACTORS:

"Individuals designated as Independent Contractors in the Agency appear in many cases to be employees under the requirements of Social Security and Internal Revenue legislation requiring the deduction of Social Security taxes."

25X1A [redacted] "Under Federal law, Independent Contractors are individuals who undertake to provide certain service for a stipulated sum of money. In this Agency, however, Independent Contractors who are retired annuitants may be hired at a daily rate of pay which is equal to the rate of pay they received as employees and they may work in the Agency performing duties comparable to those performed as employees. A limitation of $36,000 per year is placed on what these individuals may receive. This limitation appears to indicate doubts on the part of Agency officials as to whether they are actually employees as the $36,000 limitation of Title 5 of the U. S. Code applies only to employees. It does not apply to an Independent Contractor who contracts to perform a certain service and is not an employee. It is as though the Agency follows the Alice in Wonderland system of defining Independent Contractors i.e., an Independent Contractor is just what we say it is, no more, no less."

Comment: [redacted] FOIAB5

FOIAB5 [redacted] The Agency's current regulatory authority to engage independent contractors is contained in [redacted] 25
which states: "There are two categories of contract personnel: contract employees and independent contractors. . . . INDEPENDENT CONTRACTORS are not employees of the U. S. Government. They are self-employed individuals who are engaged under contract to provide specific services. They receive only the compensation and benefits considered necessary to retain their services.

In the Operations Directorate, their duties are normally limited to historical research and analysis and to the direction, utilization, spotting, or support of agents. They normally do not carry out espionage or covert action tasks. (Care must be taken to distinguish between independent contractors, defined herein, and agents, defined in [redacted]) 25X1A

The evidence does not support [redacted] 25X sweeping allegation that the Agency is misusing the category of independent contractor, particularly as it applies to engaging government civilian annuitants as independent contractors to avoid deducting taxes and Social Security and providing employee benefits. Compensation paid American citizen or resident alien [redacted] independent 25 contractors is reported to Internal Revenue Service by this Agency through the use of a Form 1099; a copy goes to the individual. It is the independent contractor's responsibility to report this sum on his income tax return and to pay social security taxes on his income tax return as a self-employed individual. Since IRS has received a copy of the Form 1099 directly from the Agency, it is in a position to check the amount of income declared by the independent contractor.

Though there is no absolute rule for determining whether one is an independent contractor or an employee, the Civil Service Commission has established six criteria to distinguish one category from another. The six questions asked in each case are:

a. Is the work done at a Government site or installation?

b. Are tools and equipment furnished by the Government?

c. Is the work essential to accomplishment of the Agency's mission?

d. Will the need for service exceed one year?

e. Does the Agency or other agencies use regular employees for similar work?

f. Is close supervision by a Government employee required?

Generally, no particular one of the six questions is controlling. Situations can arise in which some of the criteria indicate the individual is an employee, yet, based on the situation as a whole, the person is properly categorized as an independent contractor. Special security requirements, for example, may dictate that the work be performed at CIA Headquarters.

In considering a request for a contract as an independent contractor, these six criteria are considered by the Office of Personnel. Clearly, if a reemployed annuitant is to continue in the same job after retirement that he held before retirement, even for a brief period, an employer-employee relationship is proper. For example, several employees retired as of 31 December 1974 for whom replacements had not yet been identified. The Office of Personnel took the stance -- despite loud and continuing complaints from certain of the individuals concerned -- that those continuing in the same job must be hired as employees, not as independent contractors. When there is doubt or disagreement between the Office of Personnel and the operating component as to whether an individual is indeed an independent contractor, the Office of Personnel refers the case to OGC for determination.

With regard to the amount of compensation payable under our Agency regulations to an annuitant rehired as an independent contractor or a contract employee, we have since 1967 adopted the policy that the annuity plus the compensation authorized under the contract may not exceed 90 percent of the current salary of the grade and step held by the annuitant at the time of his retirement. No other Agency in the Government has adopted the 90 percent limitation. Indeed, elsewhere in the Government an employee, for example, who retired as a GS-11 could be reemployed as a GS-14 and draw the salary of a GS-14 with only his GS-11 annuity offset against the GS-14 salary. Mr. Thomas A. Tinsley, Director, Bureau of Retirement, Insurance, and Occupational Health, Civil Service Commission stated in a hearing before the House of Representatives Subcommittee on Retirement and Employee Benefits on 23 April 1975 that certain

agencies such as Peace Corps, Arms Control and Disarmament and others have statutory authority for exclusion from the law requiring reduction of salary by an annuity equivalent for their employees. In those very few instances where the CIA-imposed 90 percent rule has been waived, such a waiver has been personally approved by the Director or the Deputy Director for Administration.

It should be noted that a request to rehire any civilian annuitant in CIA, whether as an employee or independent contractor, must have the concurrence of the Deputy Director concerned and the personal approval of the Director of Personnel. Such requests are approved only for a period of one year at a time. Any requests for extension must go through the same approving authority with another examination of the use being made of the

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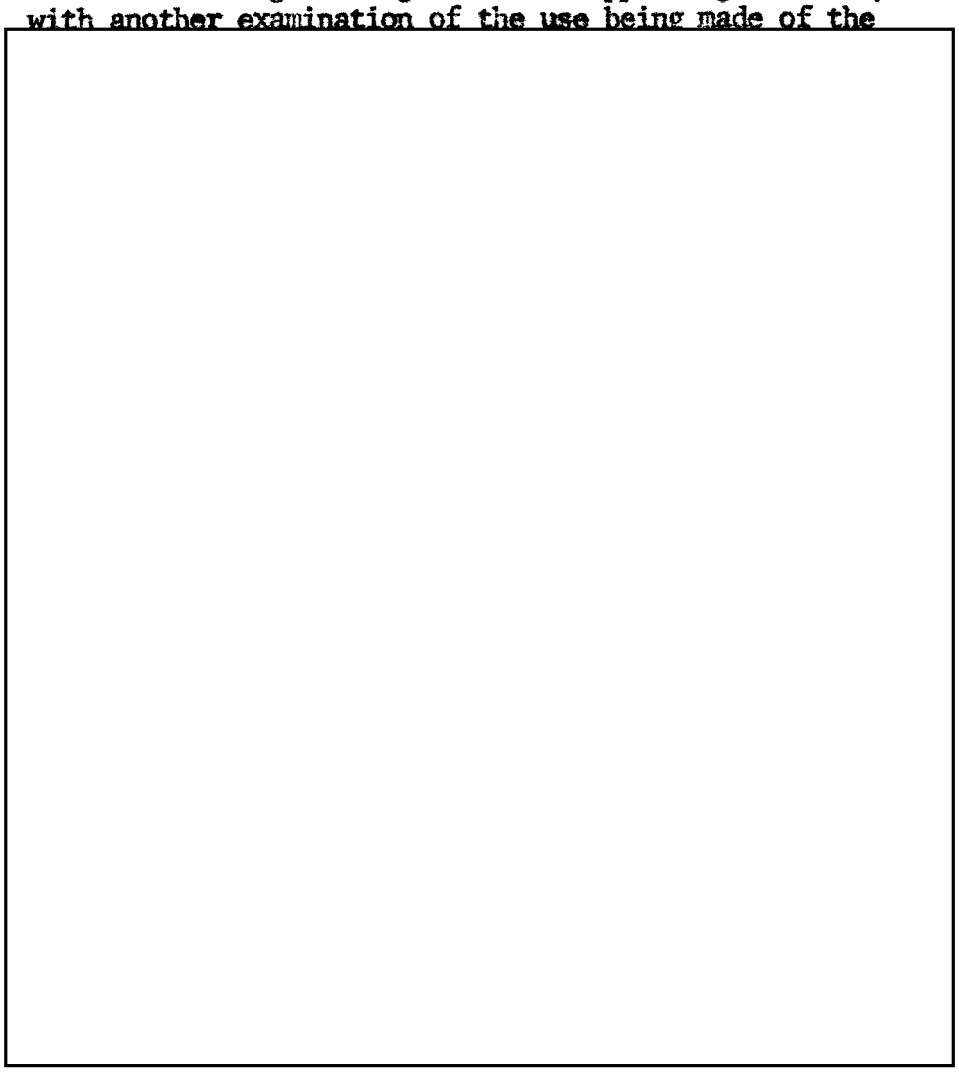

The Agency's utilization of rehired annuitants as independent contractors is generally limited to the following types of tasks:

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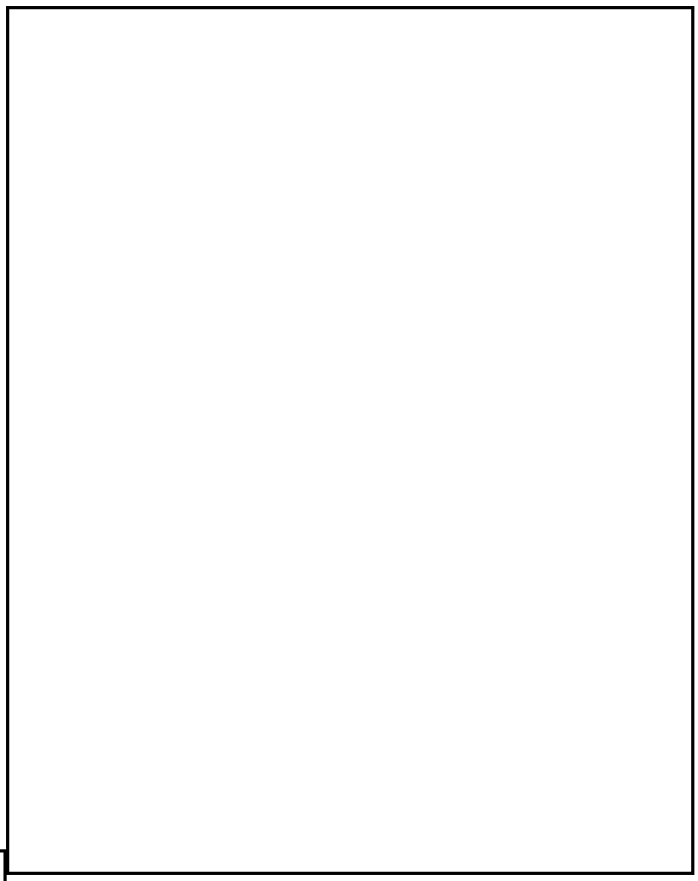

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4. [redacted] SUGGESTIONS AND PROPOSALS FOR CORRECTIVE ACTION:

a. Issue regulations to correct overtime and independent contracting practices.

Comment: As noted above, we believe that Agency policies and practices regarding overtime should be restudied and appropriate action taken as a result of such studies.

On independent contracting practices, our view is that present policy, which is more restrictive than elsewhere, is defensible. The Office of Personnel will, however, continue to monitor carefully the use and status of reemployed annuitants.

b. Give the Position Management and Compensation Division the authority to make a complete review of positions and take corrective action, possibly spaced over a period of time to avoid downgrading actions.

Comment: PMCD is currently charged with conducting scheduled position management and classification surveys of all major Agency components at least once each 36 months. [redacted] sweeping allegations that Agency positions are excessively overgraded are not supported by the facts available. In our view PMCD should not have the full authority suggested by [redacted] An appeal mechanism must be provided and maintained at the Director of Personnel level to permit operating component managers an opportunity to present their arguments and evidence when they disagree with determinations made by PMCD. The results of the study currently being undertaken under DDA purview of Agency position management and classification practices should be considered as a basis for any changes in Agency policy, practices and authorities in this area.

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c. Promotions should be based on performance in positions legitimately graded, not on speculative potential as determined by a Career Service Board. Promotions should be under the control of supervisors who are the only individuals qualified to judge work performance and employees' grades should be limited to the grades of their positions.

Comment: [redacted] is expressing his disagreement with the Agency's Career Service personnel management system which was thoroughly reviewed and reaffirmed as appropriate by the Management Committee and the Director in early 1974. While concluding that the Career Service personnel management system should be retained, it was recognized that improvements were necessary to enhance the effectiveness of Agency personnel management. The Annual Personnel Plan, the Personnel Development Program and the several recommendations submitted by the Personnel Approaches Study Group (PASG) were instituted for this purpose. The line supervisor certainly has a role in evaluating the performance of personnel under his jurisdiction, but the Career Service and Sub-Career

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Service Boards must have purview over the broader and longer range aspects of employee performance and development. The principle of "rank in the man" with due consideration of the grade level of the position of assignment is inherent in the Career Service competitive ranking and evaluation system.

UNITED STATES CIVIL SERVICE COMMISSION

IN REPLY PLEASE REFER TO

WASHINGTON, D.C. 20415

YOUR REFERENCE

Honorable George P. Shultz
Director
Office of Management and
Budget
Washington, D. C. 20503

3 Dec 1971

Dear Mr. Shultz:

Enclosed for your consideration is a draft Executive order entitled, "Providing for the Appointment in the Competitive Service of Certain Present and Former Employees of the Central Intelligence Agency."

The proposed order results from discussions between the Civil Service Commission and the Central Intelligence Agency to set up a system that would facilitate the movement of career employees between the competitive service and the CIA. An Executive order is needed if CIA personnel are to be able to move into the competitive service noncompetitively. Under the interchange agreement that would be established if an Executive order is signed, competitive service employees would also be able to move noncompetitively into CIA positions for which they are qualified.

The proposed order would enable the Government to make better use of its personnel resources. Under the proposed order, the competitive service could offer noncompetitive entry to CIA personnel who have needed occupational skills and a good record of public service. This would add flexibility to the merit system and offer a high quality recruitment source at low cost.

We are requesting an Executive order because only the President can authorize this type of noncompetitive entry into the competitive service. In this respect, the situation is the same as that prompting issuance of Executive Order 11219, which provided a basis for noncompetitive entry into the competitive service of career Foreign Service personnel.

The Commission, recognizing the necessary qualifications and the caliber of persons holding career-type appointments in the CIA considers the noncompetitive entry of such persons into the competitive service as compatible with merit system principles. The on-site observations of a Commission team assure us that the operations of the CIA personnel system are consistent with merit principles.

The Commission recommends that the Executive order be cleared in accordance with established practice and that it be submitted for approval by the President.

By direction of the Commission:

Sincerely yours,

/s/

Robert E. Hampton
Chairman

Enclosure

EXECUTIVE ORDER

PROVIDING FOR THE APPOINTMENT IN THE COMPETITIVE SERVICE OF CERTAIN PRESENT AND FORMER EMPLOYEES OF THE CENTRAL INTELLIGENCE AGENCY

By virtue of the authority vested in me by sections 3301 and 3302 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Under regulations of the Civil Service Commission (hereinafter referred to as the "Commission"), a present or former employee of the Central Intelligence Agency (hereinafter referred to as the "Agency") may be given an appointment in the competitive service without competitive examination when he has at least one year of continuous service in the Agency under one or more nontemporary appointments. Eligibility for appointment under this section expires 3 years after separation from a nontemporary appointment in the Agency unless the individual is a preference eligible as defined in section 2108 of title 5, United States Code or has completed at least 3 years of substantially continuous service in the Agency under one or more nontemporary appointments.

Sec. 2. The Commission shall prescribe the conditions under which an employee appointed under section 1 of this order becomes a career employee.

Sec. 3. An individual given a career or career-conditional appointment under section 1 of this order acquires a competitive status automatically on appointment.

Sec. 4. Any law, Executive order, or regulation that would disqualify an applicant for appointment in the competitive service shall also disqualify an individual for appointment under section 1 of this order.

THE WHITE HOUSE

, 1971

6 JUN 1974

MEMORANDUM FOR: Deputy Director for Management and Services

SUBJECT : Overtime and Premium Pay Policy

1. Action Requested: Change in overtime and premium pay policy and regulations to conform to the requirements of Federal Law.

2. Basic Data:

Federal Laws

Title 5 U.S. Code, Subchapter V establishes the basic requirements for overtime for general schedule employees. These are as follows:

Section 5542: Overtime rates; computation

(a) For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or (with the exception of an employee engaged in professional or technical engineering or scientific activities for whom the first 40 hours of duty in an administrative workweek is the basic workweek and an employee whose basic pay exceeds the minimum rate for GS-10 for whom the first 40 hours of duty in an administrative workweek is the basic workweek) in excess of 8 hours in a day, performed by an employee are overtime work. (NOTE: The provision designating work in excess of 8 hours in a day as overtime was originally included in Federal Law in Public Law 89-504, 18 July 1966.)

Section 5543: Compensatory time off

(a) The head of an agency may

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off from his scheduled tour of duty equal to the amount of time spent in irregular or occasional overtime work instead of being paid for that work.

Section 5545: Annual premium pay

(c) the head of an agency, with the approval of the Civil Service Commission, may provide that

(2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regular scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than ten per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular, unscheduled overtime duty required in the position.

(The Civil Service Commission has established the following rules for determining the amount of annual premium pay:

1. An average of at least three but not more than five hours per week of irregular or occasional overtime work - 10%.

2. An average of over five but not more than seven hours per week of irregular or occasional overtime work - 15%.

3. An average of over seven but not more than nine hours per week of irregular or occasional overtime work - 20%.

4. An average of over nine hours per week of irregular or occasional overtime work - 25%.)

Fair Labor Standards Act Amendments of 1974
(P.L. 93-259, April 8, 1974)

Effective May 1, 1974, except for certain employees in executive, administrative, and professional positions, and those in foreign areas, all Federal employees are entitled to overtime pay for all work which the employer "suffers or permits" to be done. The Civil Service Commission will issue a tentative list of the exempt employees by April 26. Most employees at GS-11 and below will be covered under this law.

The Civil Service Commission, as the enforcement agency, will be responsible for post audit of overtime pay administration to determine violations and order corrective action.

Agency Regulations

A. Overtime

The Agency regulations on overtime and annual premium pay follow the Federal Law in some respects. However, points of substantial difference are:

1. Employees, GS-12 through GS-14, may receive overtime payments or compensatory time in lieu thereof for directed overtime work in excess of 48 hours in a given work week.

2. No overtime payment or compensatory time will be granted for hours of duty between 40 and 48 in a given work week unless such hours represent directed work on,

a. a position which requires substantial amounts of overtime work on a continuing basis, the productivity of which is predominantly measurable in units of production or hours of duty performed;

b. on any day during a work period of seven or more consecutive days, or,

c. a second job, the duties of which are substantially unrelated to the primary assignment.

(The requirement that 8 hours of work be contributed without pay is inconsistent with the Federal Law and with good management principles.)

The Agency regulation also provides for the substitution of compensatory time in place of regular overtime either on the request of employees at GS-11 and below or by

direction of the supervisor for employees in higher grades even though the Federal Law provides for such substitution only in the case of irregular or occasional overtime work.

The Agency regulation has never provided that overtime pay is required for all work in excess of eight hours in a day. There are a number of nonstandard work schedules in the Agency now utilizing 12 hour work days for which under Federal Law four hours of overtime pay are required for each 12 hour day. Other agencies which have tried similar schedules have been required to pay overtime. Compensatory time was not permitted.

The Agency overtime regulation has been in substantially the same form since March 1962. During this period the Agency regulation has required the normal sacrifice of eight hours of overtime compensation for employees at GS-12 through GS-14.

B. Annual Premium Pay

The provision of the Agency regulation covering annual premium pay is substantially the same as that established by the Federal Law.

Application of Agency Compensation Policy

Agency professional employees at GS-12 and above have been expected and encouraged to work overtime whenever they determined that such work was necessary or when directed, in nearly all cases without any form of compensation. Agency duty officers have worked in Headquarters offices on Saturday regularly for a dozen years or more without any form of compensation. The expressed view of many high officials has been that Agency professionals should be glad to perform such "discretionary" overtime without additional pay, since they are well compensated by their regular salaries. This view is in disregard of the fact that their regular salaries are based on a 40-hour week.

Agency officials having authority to approve such overtime have been aware that it was being performed and approved of it.

Failure to formally authorize or approve overtime where approving officials were aware of and agreed to performance has been held by the Court of Claims to require payment.

The Court of Claims in Anderson v. United States 136 Ct. Cl 365 (1956) makes the point that "The Commissioner of Customs, as the authorized deputy of the Secretary of the Treasury, had authority under the statute

to order or approve overtime. While he did not order the work to be performed, he certainly knew and approved of its being done. . . . In withholding orders for the approval of overtime, the Commissioner intended to withhold compensation for services performed. . ." The Court directed payment to the employee.

The Court of Claims in Rapp v. United States, 340 F. 2d 635, 167 Ct. Cl 852 (1964) decided further "Where plaintiffs were not only induced to perform duty officer tours but were given reasonable and understandable grounds for fearing they might jeopardize their positions if they did not do so" they were entitled to compensation.

Many CIA professionals have performed Saturday duty tours without question and without overtime pay for many years for this reason. It seems clear that the fear of reprisal is a strong deterrent to employee claims for overtime.

With regard to annual premium pay, while the Agency regulation is substantially in agreement with the Federal Personnel Manual, we have deviated from the established percentage requirements for pay. In certain cases it was decided, for administrative reasons, to pay a lesser percentage rate than established. The legality of these actions is questionable.

Applicability of Federal Law to the CIA

The question as to whether the Federal Premium Pay law applies to the CIA has apparently never been ruled on by the Comptroller General or the Courts. The U.S. Code Title 5, Subchapter V on Premium Pay, however, provides for no exclusion of the Agency. While this may not be conclusive, it should be noted that Chapter 51, Title 5, on Classification of Positions, does provide for exclusion of the Agency. The absence of a specific exclusion for application of Premium Pay provisions to the Agency is evidence of intent that the Agency should be covered.

3. Staff Position

The provision of the Agency regulation limiting compensation for the first eight hours of overtime to employees at GS-12 through GS-14 predominantly in production jobs is prejudicial to the rights of employees in jobs not of a production nature who may be equally industrious and conscientious. Further, it is inconsistent with the annual premium pay provision which does not provide for ignoring the first eight hours of overtime.

The primary reason for the Agency regulation may FOIAB5 have been to discourage the use of excessive overtime but the result was to avoid payment for overtime while benefiting from the extra work performed. This result is not defensible in principle.

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FOIAB5 [redacted] The Civil FOIAB5 Service Commission's exception of the Agency from its overtime regulations lent additional support to this position. FOIAB5

FOIAB5 [redacted] The Congress now seems more concerned with employees' rights than it did many years ago. Employee organizations are more vociferous. Further, it is difficult to explain to employees why in the CIA one gives eight hours of free overtime to the Government which he is not required to do elsewhere. This cannot be justified on security grounds.

From the tone of decisions of the Court of Claims on the right of Federal employees to overtime compensation, it seems probable that any claim by an Agency employee supported by evidence of overtime work with tacit approval of officials would be decided in favor of the employee. Such a decision might require the Agency to compensate other employees so deprived of overtime compensation.

Therefore, consideration should be given to bringing all forms of Agency premium pay into line with the general Federal Law. Consideration should also be given to reviewing the extent to which employees who have not been compensated for overtime should be paid.

4. Recommendation:

a. That a committee be established in the Office of Personnel to review the overtime pay policies and regulations and revise to bring into agreement with the Federal Law.

b. That the committee determine practicable limitations to set on the authorization of overtime.

c. That the committee consider and make recommendations as to the extent to which employees who have worked overtime without compensation under the present regulations should be compensated.

(Signed) F. W. M. Janney

F. W. M. Janney
Director of Personnel

APPROVED /s/ Harold L. Brownman * 11 JUN 1974
Date

DISAPPROVED _____ _____
Date

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* Pending OGC Concurs and agrees to assist in the study.

ATTACHMENT # 3

Approved For Release 2006/01/03 : CIA-RDP80B01086A000900110006-6

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OGC 74-2338
12 December 1974

MEMORANDUM FOR THE RECORD

SUBJECT: CIA Policy on Overtime Compensation

I. INTRODUCTION

1. This memorandum is a review of the Agency's policy on overtime compensation, both in terms of its evolution and its legality. The legality of the policy turns on the question of whether the Agency, as a matter of law, is subject to part or all of the provisions of the Federal Employees Pay Act of 1945, as amended and perhaps, throughout the history of the Agency, no other single, legal question has given rise to as many memoranda and opinions. The question is not easy; it is finite, the answer infinite. As with any interpretation of a statute or the relationship between several statutes, only an appellate court can provide the final answer. Short of that, the lawyer, in rendering a legal opinion to his client, is obliged to act both as judge and advocate, being first the finder of the law and then the proposer of a course of action.

2. The evolution of the Agency's policy divides into three basic periods -- the formative years (1947-1959); a first review period, precipitated by the Byrnes decision (1963-1965); and a second review period (1966-present). I have first compared the Agency's current policy to both the overtime laws and regulations applicable to most other departments and agencies, and to the Fair Labor Standards Act of 1938 (FLSA), as amended, which is now applicable to Federal employees. This is followed by an examination of the laws and regulations which bear on the question. I have then set out in detail the holdings and opinions of the three periods. Lastly, some conclusions are drawn concerning the legality of "the policy."

II. THE CURRENT POLICY BY COMPARISON

1. The following are general statements on the requirements for overtime compensation, or compensatory time off in lieu thereof under Title 5

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of the U. S. Code, the FLSA, and CIA regulations. Certain exceptions not applicable to the great majority of Agency and other Federal employees have been omitted.

2. What Hours of Work Are Considered Overtime Hours?

A. Title 5: "Hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, or ... in excess of 8 hours in a day, performed by an employee are overtime work...." 5 U.S.C.A. 5542(a).

B. FLSA: Generally, "...no employer shall employ any of his employees ... for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed." Sec. 7(c). Under the FLSA overtime is compensable if the employer suffers or permits it to be worked. In other words, for nonexempt employees overtime need not be officially ordered or approved as is presently required. Under the concept, any work performed by a nonexempt employee for the benefit of the Agency, whether requested or not, is working time if the employer knows of or has reason to believe it is being performed.

C. CIA: "Compensable overtime is that work performed by an employee in excess of the normal basic workweek which has been authorized by a designated senior official as compensable...." [redacted] "The basic 40-hour workweek consists of five consecutive duty days, normally Monday through Friday;" and "(T)he basic nonovertime workday does not exceed eight hours." [redacted]

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3. Rate of Overtime Compensation.

A. Title 5: Essentially the same provisions as followed by CIA (see below). 5 U.S.C.A. 5542(a)(1).

B. FLSA: "...a rate not less than one and one-half times the regular rate at which he...(the employee)...is employed." Sec. 7(a). Note that "regular rate" includes the scheduled or basic rate, night differential, and Sunday premium pay.

C. CIA: "The overtime pay rate is one and one-half times the hourly rate of basic salary but will not exceed one and one-half times the minimum scheduled rate for GS-10." [redacted] Thus, no overtime hourly rate may be greater than one and one-half times the first step of a GS-10. 25X1A

4. Compensatory Time.

A. Title 5: "The head of an agency may --

(1) on request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work; and

(2) provide that an employee whose rate of basic pay is in excess of the maximum rate of basic pay for GS-10 shall be granted compensatory time off ... instead of being paid for that work ...." 5 U.S.C.A. 5543.

B. FLSA: No comparable provision. The FLSA requires that a nonexempt employee be compensated for hours in excess of 40 hours a week at a rate not less than one and one-half times his regular rate.

C. CIA:

i. Employees, GS-11 and below, may, at their request, receive compensatory time off in lieu of payment for directed overtime;

ii. Employees, GS-12 through GS-14, may also receive compensatory time off if they request it, but only to the extent the hours are otherwise compensable as overtime.

iii. Also, employees, GS-15 or above, may receive compensatory time only to the extent the hours are compensable as overtime.

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5. Exemptions from Overtime.

A. Title 5: "An employee may be paid premium pay ... (overtime, annual premium pay, Sunday and holiday pay) ... only to the extent that payment does not cause his aggregate rate of pay for any pay period to exceed the maximum rate for a GS-15." 5 U.S.C.A. 5547.

B. FLSA: There are a host of exemptions from both the minimum wage and overtime requirements of the Act, but those most applicable to the Agency are the so-called executive, administrative, and professional exemptions. Sec. 13.

C. CIA:

i. Employees, GS-11 and below, may receive overtime for all hours of directed overtime, except that in any pay period an employee's aggregate compensation (basic salary, overtime, holiday pay, annual premium pay, night differential, or compensatory time off in lieu of overtime) may not exceed the maximum scheduled rate for a GS-15;

ii. GS-12 through GS-14 employees may NOT be compensated for the hours of directed overtime between 40 and 48 either by overtime pay or compensatory time, UNLESS the directed hours are: "...(O)n a position which requires substantial amounts of overtime work on a continuing basis and the productivity is predominantly measurable in units of production or hours of duty performed; ...on any day during a work period of seven or more consecutive days, or...on a second job the duties of which are substantially unrelated to the primary assignment." The same aggregate compensation limitation applies with respect to exceeding the maximum scheduled rate for a GS-15;

iii. GS-15 employees may not receive overtime or compensatory time in lieu thereof, except in the case of a "production" oriented position or under the second job concept mentioned above. In addition, the aggregate compensation limitation applies. [redacted]

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6. Beyond this skeletal outline of the statutes and regulations, some of the differences and conflicts which exist between them require amplification. First and most important of these is the provision within Agency regulations which provides that no premium pay of any kind -- either overtime or compensatory time off -- may be paid to GS-12's and above for directed overtime for hours of work between 40 and 48 in a given workweek, subject to the exceptions set out in paragraph 5c supra. The meaning of this provision, which has been dubbed by many Agency employees as the eight-hour donation or forfeiture rule, is that in any standard 40-hour workweek most GS-12's and above receive no compensation of any kind for the 41st through the 48th hour of work. No comparable provision exists in either of the other two authorities.

Title 5 provisions speak of "regular" overtime and "irregular or occasional" overtime, defining regular overtime work as "overtime which is regularly scheduled" and irregular or occasional overtime work as that "which is not regularly scheduled." For regularly scheduled overtime work, the employee must be paid wages subject only to the rule on aggregate compensation. Only in the area of irregular or occasional overtime does Title 5 permit some latitude by providing that the head of an agency may, at the request of an employee, grant compensatory time off in lieu of overtime and may, on his own, direct only compensatory time off in lieu of overtime for an employee whose basic rate of pay exceeds the maximum rate of a GS-10.

7. A second significant difference lies in the breaking point at which neither overtime nor compensatory time off will be paid to employees and at which, under Title 5, the head of an agency may direct compensatory time only. Title 5's breaking point is based on salary -- the maximum basic rate of a GS-10. Under Agency regulations, employees through GS-11 may be paid overtime or receive compensatory time off in lieu thereof, the breaking point thus being the first step of GS-12, with employees GS-12 and above generally receiving no premium compensation for the 41st through the 48th hour of work. Under the FLSA a nonexempt employee must be paid wages for all hours of overtime work. It is my understanding that Civil Service is examining with the Department of Labor the possibility of retaining the concept of compensatory time if requested by such employees because some nonexempt employees would rather earn leave than be paid wages. As of the date of this paper, however, I know of no decision on this matter.

8. A third difference between the three authorities is that of overtime on a daily basis. Under Title 5 overtime must be paid for hours of work in excess of 40 in any administrative workweek and in excess of eight in any workday. Section 7 of the FLSA requires overtime payment only after 40 hours in any given workweek, as does [redacted] 25X1

III. THE LAWS AND REGULATIONS

1. To appreciate the Agency's somewhat unsettled policy and legal position on overtime over the years, it is necessary to understand all of the laws and regulations which bear on the question, some of which predate the Agency. The benchmark statute is the Classification Act of 1923, 42 Stat. 1488, 4 March 1923, which established both the criteria for classifying most positions within the Federal civil service and the compensation schedules for the positions. With certain exceptions not applicable to this paper, the Act was applicable

to most civilian positions within the executive departments of the Government. A three-man "Personnel Classification Board," comprised of the Director of the Bureau of the Budget, a member of the Civil Service Commission, and the Chief, U. S. Bureau of Efficiency, was established to promulgate rules and regulations necessary to effectuate the purposes of the Act.

2. The Classification Act underwent a number of revisions between 1923 and 1945, at least one of which requires a few words. By a 1940 amendment, 54 Stat. 1211, 26 November 1940, Congress vested in the President most of the responsibilities formerly held by the Classification Board and established three-man efficiency rating boards of review in each of the executive departments. With respect to the President's authority, he could, upon a report and recommendation of the Civil Service Commission, extend by Executive Order the provisions of the Classification Act of 1923 to any offices or positions not then covered.

3. The crux of this paper is the convergence of the next statute, the "Federal Employees Pay Act of 1945," a further amendment to the Classification Act, with the Civil Service Commission regulations issued thereunder and Section 8 of the Central Intelligence Agency Act of 1949. The Pay Act, P.L. 79-106, 30 July 1945, is divided into six different titles, and, by their terms, Titles II and III, "Compensation for Overtime" and "Compensation for Night and Holiday Work," (now generally, 5 U.S.C.A. 5541-5550) apply "to all civilian officers and employees in or under the executive branch of the Government,..." Sec. 101(a). In addition, Title IV, later repealed by a subsequent act, applied "to officers and employees who occupy positions subject to the Classification Act of 1923, as amended. Beyond simply designating the applicability of the various titles of the Act, the appellation process itself further illuminates an existing fact in the mind of Congress -- all civilian officers and employees of the executive branch of Government do not occupy "classified positions"; but all civilian officers and employees in or under the executive branch are covered by Titles II and III.

4. The "Miscellaneous Provisions" title of the Pay Act, Title VI, (5 U.S.C.A. 6101) contains two sections which apply "to civilian officers and employees of the Government according to the terms thereof." Sec. 101(d). Section 604 charges "the heads of the several departments and independent establishments and agencies in the executive branch" with the duty of establishing a basic administrative workweek of 40 hours. Section 605 authorizes the Civil Service Commission to issue regulations necessary for the administration of the Act "insofar as this Act affects officers and employees in or under the executive branch of the Government," such regulations being subject to the approval of the President.

5. As previously noted, the effective date of the Pay Act was 30 June 1945. Simultaneously, President Truman signed Executive Order 9578 approving and embodying in toto the Commission's regulations. The coverage of both the overtime, holiday and night pay provisions, Sections 101 of Chapters I and III, are identical; they apply "to all civilian officers and employees in or under the executive branch of the United States Government, ..." Additionally, the requirement for paying overtime and the overtime rates are essentially the same as provided within the Act.

6. A year later, Congress passed a second pay act, the "Federal Employees Pay Act of 1946." This legislation was a hodge-podge of provisions -- amendments to both the Classification Act and the 1945 Pay Act -- a sort of tidying up of the things which were overlooked a year earlier. It also provided raises in the compensation rates for the various pay schedules. It is mentioned here solely to emphasize how, by 1946, the concepts of "civil service," "classified service" and "Federal pay schedules" had become inextricably, though amorphously joined in the congressional mind.

7. By way of reflection, on the eve of the Agency's birth, in the area of personnel and pay, the Classification Act of 1923 and the Federal Employees Pay Act of 1945 were the statutes which were generally applicable to executive agencies. As will be shown, however, while both were concomitant statutes at the moment of birth, like the midwife, they have had little influence in molding the progeny.

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IV. THE OPINIONS

1. As has been shown, the ubiquitous nature of the Pay Act question is rooted in the statutes and regulations which were either in existence in 1947 or enacted during the years 1947-1949; and, very early on, this Office became embroiled in the issues and legal questions. During the period 1947-1959, the Office of General Counsel position moderated from a clear statement that "the Agency is subject to the Pay Act of 1945" to "this consideration ... (the possibility of a suit on the eight-hour donation rule) ... should ... (not) ... stand in the way of implementing the proposed procedure." In fairness to Agency command and this Office, it must be noted that during the formative years the Agency was under great pressure to curtail overtime costs and most regulatory departures from a strict adherence to Pay Act provisions were effected only after consultation with other interested agencies. This was particularly true in the case of the eight-hour donation rule which was informally cleared with the General Counsel to the Comptroller General and with members of his staff.

2. The Formative Years (1947-1959).

A. One of the earliest considerations of the Pay Act question is found in an opinion written by [redacted] in response to a request from the Director of Training. VI OGC 97, 1 August 1952. Therein he examined the question of whether overtime compensation had to be paid to employees who attended training courses (now a moot question both under Title 5 and FLSA) and whether the Agency could establish a workweek for employees attending training courses which would preclude the payment of overtime compensation. Because of the language, "...shall apply to all civilian officers and employees in or under the executive branch of government," the author states: "It is apparent that as of the date of its inception, CIA was subject to the provisions of Federal Employees Pay Act of 1945." He then examined E.O. 9578, 30 June 1945, by which the President, pursuant to the Act, approved the Commission's original Federal Employees Pay Regulations and the fact that the 18 August 1950 amendments to the regulations specifically exempted CIA from the overtime, night and holiday pay provisions. He bypassed, however, the crucial question of whether the regulatory exemption had the effect of removing the Agency from the basic coverage of the 1945 Pay Act and states that OGC did not "believe the Agency is exempt from the provisions of the overtime compensations statutes by virtue of the several organic acts applicable to it." He concluded by noting it was stated Agency policy to adhere to the usual compensation and overtime provisions of the Government:

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> ...(W)e would construe the stated exemption of CIA from the operation of the pay regulations as tantamount to a declaration of policy by the Civil Service Commission that it will not attempt to inject itself into the operation of the internal administrative machinery of CIA;
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> * * * *
>
> As has been stated, Agency policy has been to adhere to the usual overtime and compensation provisions of the Government under the Federal Employees Pay Act of 1945. This policy coupled with the obvious doubt as to whether the Agency, regardless of the provisions of the Pay Regulations, is exempted from the 1945 Pay Act, serves to re-enforce the desirability, as seen by this office, of considering the problem from its practical administrative aspects.

B. Another opinion written for the Deputy Assistant Director for Personnel and dated 6 January 1955, stated very strongly that the Agency was subject to the overtime provisions of the Pay Act:

> Our conclusion in this regard is based on the following. Section 101(a) of the Act, in relevant part, provides that:
>
> > "Subject to the exemptions specified in section 102 of this Act, titles II and III of this Act shall apply (1) to all civilian officers and employees in or under the executive branch of the Government...." (Emphasis added.)
>
> * * * *
>
> The exemptions to the statute are listed in section 102. Among these the Central Intelligence Agency is not listed; nor has it been listed in any amendments to the law enacted by the Congress.

> The Classification Act of 1923, as amended, has been amended by the Classification Act of 1949 (63 Stat. 954, 5 U.S.C. 1071). Section 202(16) of this Act exempts the Agency from its application. From this and the material set out in the preceding paragraph, we conclude that this Agency is subject to Title II ("Compensation for Overtime") [and] Title III ("Compensation for Night and Holiday Work")....

X1 C. In 1958, [redacted] wrote another research paper for the signature of the General Counsel. XI OGC 133, 13 June 1958. This paper was in response to certain specific questions from the Director of Personnel concerning contemplated changes in the Agency's pay system. The paper discusses the Commission's letter to DCI Hillenkoetter concerning the Classification Act of 1923 quoted supra, and then quotes from the DCI's reply letter dated 10 August 1950:

> You may be assured that in our internal personnel administration we will be governed by the basic philosophy and principles of the Classification Act, the Civil Service Commission's allocation standards, the pay scales, the within-grade salary advancement plans, and the pay rules of the Classification Act, as they may be amended from time to time, in substantially the same manner as provided for other agencies.

The opinion then turned to answer the questions asked and the thrust of the answers makes it clear the office position continued to be that the Agency was subject to the Pay Act.

D. That rigid position came under fire and began to crumble when, in January 1959 the so-called eight hour rule finally received a qualified, legal go-ahead. The General Counsel, in a 28 January 1959 opinion to the Deputy Director for Support, reviewed a proposed regulation and responded:

> The attached draft of a proposed regulation on overtime has been reviewed by this Office and discussed with the General Counsel to the

Comptroller General. With his approval, it was further reviewed with members of his staff who were of the same opinion as we that there was no legal objection to the adoption of this proposal.

We all feel that we might be subject to suit by employees under the overtime compensation provisions of the Federal Employees Pay Act Amendments of 1954. The outcome of such a suit is uncertain and would probably depend upon the facts in any one case. It is possible that a court would feel it illogical to pay overtime for hours in excess of 48 but not for hours between 40 and 48. It might raise the question of how we determined which of the hours worked were overtime for pay purposes and which were gratuitous. The proposal as a whole appears well designed to meet the needs of the Agency and to be in the general interest of good Government administration. Since there is no assurance that any suit will be filed or if filed that it would necessarily be successful, we do not feel that this consideration should stand in the way of implementing the proposed procedure.

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A statement by [redacted] who served as Director of Personnel at the time the new regulation was adopted, provides an insight into the mood of senior Agency officers on overtime.

The regulation on overtime stated that professional people would earn overtime only after they had contributed eight hours per week. The C/OPS/DDP (Helms) felt very strongly about this regulation because it had come to his attention that people came to work at eight thirty, took a comfortably long lunch, waited around until six, charging an hour as overtime. Helms had the feeling that some people showed up in the building on weekends merely to come in out of the rain. He had no idea why they were there and what the

importance of their work actually was. These rather negative views were held about certain individuals. In general the belief was that the Agency was a career service seeking certain benefits which would put it on a level with the Foreign Service and the military service, and for this reason management had every right to expect that its people would not be watching the clock and counting every hour. The reason for paying overtime beyond the eight hours was that the Agency did impose on some individuals beyond reason and therefore should pay them accordingly.

E. A further departure is seen in another 1959 opinion dated 30 October.

> The specific problem is stated to involve deviating from the express provisions of section 25.222(b) of the Federal Employees Pay Regulations (see FPM 21-323) which requires that when leave without pay is performed within the basic 40 hour workweek, an equal period of time must be substituted and paid for at regular rates before service may be paid for at overtime rates.
>
> * * * *
>
> For reasons stated in your memorandum, you would prefer to have the Agency regulation provide that authorized overtime performed during a biweekly period be applied to make up leave without pay performed in either basic workweek of the biweekly pay period before allowing payment or credit as compensatory leave for any hours of overtime worked. The effect would still be to insure in each workweek 40 hours of basic pay prior to the receipt of overtime pay.
>
> * * * *

> ...(T)he Agency is in the anomalous situation of being bound by the law but exempt from the regulations. Needless to say, any Agency regulation must be a reasonable extension of, and not conflict with, the basic law.
>
> A review of your proposed modified pay administration policy in the light of the provisions of the Federal Employees Pay Act of 1945, as amended, discloses that it supports the act and also confirms in principal with the pay regulations. Accordingly, this Office perceives no legal objection to its adoption.

The writer then notes that the proposed policy had been cleared informally with Mrs. J. M. Turtes of the Office of the General Counsel, Comptroller General.

F. At the setting of this period, the formative years, the overtime policy of the Agency concerning non-compensable hours between forty and forty-eight was firmly established. However, the nagging questions about its legality would not subside.

3. The First Review Period (1963-1964)

A. On 15 November 1963, the U.S. Court of Claims decided the case of Byrnes, et.al. v. United States, 163 Ct. Cl. 167 (amended on 17 and 24 April 1964), a decision which dealt directly with overtime compensation. It caused the Agency and this Office to embark on a fresh review of overtime, particularly the eight hour donation rule vis-a-vis the Pay Act of 1945. The principle issue in Byrnes, was whether the extra hours actually worked by IRS investigators were officially ordered or approved as required by the statute and pertinent regulations. The Court found that specific approval for the overtime work performed was not necessary if its performance was induced by the Government but, the inducement had to be more than a "tacit expectation" that the work was to be done. Byrnes, however, starts from the premise that the Pay Act of 1945 is applicable. The initial OGC memorandum following Byrnes, XVI OGC 446, 16 December 1963, stated that if the Pay Act is applicable, then unquestionably the hours of work between

forty and forty-eight are compensable. The opinion noted it is possible to argue that officers and employees of the Agency are not covered by the Pay Act because under the CIA Act of 1949, as amended, the DCI has authority to pay for personal services without regard to any other law. However, the opinion did not come to grips with the central question -- the applicability of the Pay Act.

B. In a follow-on opinion, XVII OGC 27, 30 January 1964, one attorney sought the advice of a Miss Trickett of the General Counsel's Office, CSC, on why the Agency had been exempted from the Pay Regulations. He reported:

> . . .I inquired why Civil Service had exempted CIA from the regulation, and whether in light of the exempting regulation Civil Service felt CIA was exempt from the Pay Act.
>
> After thoroughly researching the records at Civil Service, Miss Trickett advised me that they contain no comment whatsoever regarding the exemption for CIA from the Pay Act, which was first adopted in August 1950, nor was there any correspondence between CIA and Civil Service regarding the exemption at the time it was put into the regulation. It is her conclusion that the exemption was given without 'conscious considerations' and that it was 'a fluke, an accident.' She commented that she did not believe the exemption could be legally justified, and that if the Commission were to review the matter the exemption would probably be removed from the regulations. She believes that despite the exemption in the regulations, the Agency remains subject to the statute itself.

In addition to making this inquiry to CSC, the attorney inquired at the Office of the General Counsel, General Accounting Office:

[redacted] FOIAB5

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This, insofar as my research can determine, was never done. FOIAB5

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FOIAB5 He then examined the various statements by the Comptroller General concerning Section 8 authority and concluded:

> Without a judicial decision requiring CIA to follow the Pay Act, or holding CIA exempt from the Act, the possibility exists that when presented with the question in a case brought by an employee or former employee against the Agency, the Agency could be held liable for payments required under the Act. One successful suit might then lead to a multitude of successful claims which would prove to be embarrassing and a financial burden on the Agency. Therefore, with the legal issue undecided and obviously questionable, a policy must be based on whether CIA would prefer flexibility regarding overtime FOIAB5
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> or allowing beneficial flexibility in other areas besides compensation, or whether CIA would prefer to be certain that it is not depriving its employees of recompense to which they might have a valid, legal and equitable claim. From the legal viewpoint it would appear that notwithstanding

which policy determination is made, an overtime and premium pay system should be adopted which gives Agency employees at least as much compensation as is received by other Government employees and to which they would be entitled if the Pay Act of 1945 does apply.

D. In building up to a new position paper on overtime, it appears the Office drafted for the General Counsel's signature a memorandum for the Executive Director-Comptroller and then set about debating its merits within the office, XVII OGC 79, 16 March 1964; XVII OGC 112, 25 March 1964; and, an unindexed opinion by [redacted] dated 1 April 1964. The latter notes that within the CIA Act of 1949, there is a specific, limited exemption from Section 654 of Title 5, -- a part of the 1945 Pay Act which provided for reporting personnel strength to the Bureau of the Budget -- and theorizes that because Congress felt compelled to grant this exemption, it believed CIA was subject to the Pay Act. Parenthetically this section of the Pay Act was later repealed by P.L. 81-784. 25X1

E. Two opinions of the General Counsel summarize the Office position at the conclusion of this review period. The one to the Executive Director-Comptroller, XVII OGC 131, 6 April 1964, states in pertinent part:

> ...As you know, Agency policy, now embodied in Agency regulations, does not require that overtime pay, or compensatory time, be given for all hours worked.
>
> * * * *
>
> The Agency generally has adhered to the Federal Employees Pay Act and there is solid basis for the view that, in law, we must follow it. The Byrnes decision therefore, suggests that a reconsideration of Agency overtime policy would be in order. Several courses of action are available.
>
> a. We could continue current overtime policy under which no premium pay is established and, in certain instances, there is no compensation paid for the overtime work which is

required within the meaning of the Byrnes decision. If current policy is continued and a lawsuit results, quite possibly we could successfully defend, by persuading the court that the statute does not apply.

* * * *

It is believed the serious danger to the Agency in the loss of such a suit is not the budgetary and administrative problems which would follow, costly and difficult as they would be. [redacted] FOIAB5

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. Since the Federal Employees Pay Act is intended to confer benefits on employees, since the Court of Claims exists to provide a forum for claimants, and because many Agency employees perform duties common to other Government departments and by no means peculiar to the requirements of an intelligence agency, [redacted] FOIAB5

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I believe we should permit the unique powers of Section 8 to be subjected to the risk of judicial review under these circumstances only if the issue is considered one of fundamental importance.

b. We could seek legislation specifically exempting the Agency from the Pay Act.

c. We could adjust our policies to accord to the Byrnes and prior decisions and at the same time impose strict requirements on supervisors not to require overtime work except when the needs of the Agency actually require it.

The second opinion, XVII OGC 354, 7 December 1964, is addressed to the Director, Budget Programs Analysis and Manpower, and advises him generally that this Office cannot tell with certainty if the Court of Claims would rule against the Agency in a suit for overtime by an aggrieved employee.

> The whole problem of payment of overtime depends on whether we are subject to the Federal Employees Pay Act of 1945, as amended. If we are not, our present overtime policy eliminating the first eight hours of overtime is perfectly valid and we can continue it. If we are, then it follows that we would also be bound by the decision of the Court of Claims, November 15, 1963, which would require payment of premium pay or overtime for any work over the scheduled workweek which is required to get the job done.

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[redacted]

4. The Second Review Period (1966-Present)

A. This period contains a number of significant alterations to the "policy" each of which further attests to the Agency's independence. The reader will recall it was in 1966 that certain amendments to the CIA Act were being considered and the Chairman of the Civil Service Commission wrote to the Bureau of the Budget (quoted supra, Part III).

B. On 16 August 1966, DCI Helms approved the recommendations of the Director of Personnel relating to the Federal Employees Salary Act of 1966, an act which embodied four major changes to the Pay Act

of 1945: 1) It established the concept of overtime after eight hours in any given workday in addition to the forty-hour per workweek rule; 2) It raised the point at which the option to receive overtime pay or compensatory time off rests with the employee or the Agency from the top rate of a GS-9 to the top rate of a GS-10; 3) It increased the maximum overtime rate from one and one-half times the base rate of a GS-9 to the base rate of a GS-10; and, 4) It established a 25 percent premium pay for Sunday work. The recommendation approved by the DCI and concurred in by this Office, chose not to "adopt" the eight hour day as criteria for determining overtime but "adopted" the other three provisions.

C. Just a month later another OGC attorney again queried Miss Trickett of the CSC legal staff about the Agency's regulatory exemption from overtime and while her position remained the same as in 1964, she opined that although there is no basis for this ...(the exemption)... the CSC at this late date would not volunteer to make the correction. XIX OGC 210, 19 September 1966.

D. In 1968, then Deputy General Counsel John Warner, responded to an inquiry from the Deputy Director for Support concerning premium pay for supergrades in Vietnam. He pointed out there are considerations which are not wholly legal which should be examined, that the Vietnam policy should clearly state it is an exception to and inconsistent with Headquarters Regulations and, that it might be advisable to consult with the Agency's Congressional subcommittees prior to implementing the policy. However, he advised that legally there was no objection:

> Based on the position previously taken that the Agency is not subject to the Federal Employees Pay Act of 1945 (now 5 U.S.C.A. 5541), this Office has no legal objection to the proposed policy.

And,

> The short answer to your question is that both premium pay and compensatory time in lieu thereof may be legally granted by the Agency to employees whose salaries exceed the maximum for GS-15.

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E. In mid-1969 an inter-Directorate Overtime Committee was established to again review the Agency's "policy." By memorandum of 4 April 1969 the committee set out its findings and recommended to the DDS certain changes:

> The eight-hour rule was most carefully considered from its conception to present application. The Directorates, polled through Committee representatives, were unanimous in favoring elimination of the 'rule' and amending Agency regulations to conform to standard U.S. Government overtime laws and regulations. On the other hand, no Directorate identified any situation which makes essential the elimination of the eight-hour rule or makes it impossible to live with the present policy.
>
> * * * *
>
> The Directorates expressed real concern over the Agency's consistent approval of 'squeaky wheel' or 'blackmail' claims rather than face legal challenges to its overtime policy and regulation, while withholding remuneration from the dedicated employee who does not challenge the 'system.'
>
> * * * *
>
> Despite cost implications, Committee members, representing their Deputy Directors, positively favor adoption at this time of clear-cut, easy-to-administer and equitable overtime policy and procedure.
>
> With respect to production positions and overtime compensation, Committee discussion surfaced the fact that our present regulation omits earlier provisions for dealing with production-type positions or situations to which personnel in

grades GS-11 and above are assigned. Should the eight-hour rule not be deleted, the regulation must be changed to specify the handling of overtime for higher graded 'production' personnel.

* * * *

The Committee recommends that:

X1A a. [redacted] be amended to eliminate the requirement for donation of initial eight hours of overtime by personnel at GS-11 or higher grades and to emphasize positive management controls on overtime.

* * * *

b. If recommendation a., above, is not approved, paragraph [redacted] be amended to set the grade of GS-11 as the normal cutoff for production-type positions and to provide for overtime for 'production' personnel at grades GS-12 and above. 25X1A

Recommendation (b) was adopted, recommendation (a) was not, and this essentially brings the evolution of the policy to its present state as found in [redacted] X1A

V. STATUTORY CONSTRUCTION

1. None of the above opinions have addressed the rules of statutory construction to see what assistance they may have in settling the question. And, yet, the end result of applying these rules is the only way I can see that this Office and the Chairman of the Civil Service Commission could have arrived at the positions previously cited. I will treat the subject only generally. The Pay Act of 1945 is a broad, general statute relating to most government employees.

A statute is ordinarily regarded as a general law, if it has a uniform operation. Within the meaning of this rule, a statute has a uniform operation, if it operates equally or alike upon all persons, entities, or subjects within the relations, conditions, and circumstances prescribed by the law, or affected by the conditions to be remedied, or, in general, where the statute operates equally or alike upon all persons, entities, or subjects under the same circumstances. This is true of legislation broad enough to embrace within its provisions all persons, entities, or things distinguished by characteristics sufficiently marked and important to make them a class by themselves, requiring legislation peculiar to the class in matters covered by the law. A statute is general, where the classification is not an arbitrary, but a reasonable, natural, and substantial one, resting upon requirements of public policy. 50 Am. Jur., Statutes, Sec. 6.

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> It is well settled that a special or specific law repeals an earlier general or broad law to the extent of any irreconcilable conflict between their provisions. The special or specific statute circumscribes the effect of the prior general or broad act from which it differs, and operates to engraft thereon an exception to the extent of the conflict. 50 Am. Jur., Statutes, Sec. 563.

In addition, there is an equally convincing argument that subsequent amendments to the Pay Act and possibly, even the FLSA (another general statute), have no effect upon the Agency's pay authority.

> There is no rule which prohibits the repeal by implication of a special or specific act by a general or broad one. The question is always one of legislative intention, and the special or specific act must yield to the later general or broad act, where there is a manifest legislative intent that the general act shall be of universal application notwithstanding the prior special or specific act. It is, however, equally true that the policy against implied repeals has peculiar and special force when the conflicting provisions, which are thought to work a repeal, are contained in a special or specific act and a later general or broad act. In such case, there is a presumption that the general or broad law was not designed to repeal the special or specific act, but that the special or specific act was intended to remain in force as an exception to the general or broad act, and there is a tendency to hold that where there are two acts, one special or specific act which certainly includes the matter in question, and the other a general act which standing alone would include the same matter, so that the provisions of the two conflict, the special or specific act must be given the effect of establishing an exception to the general or broad act. Hence, it is a canon of statutory construction that a later statute general in its terms and not expressly repealing a prior special or specific statute, will be considered as not intended to affect the special or specific provisions of the earlier statute, unless the intention to effect the repeal is clearly manifested or unavoidably

implied by the irreconcilability of the continued operation of both, or unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal. Unless there is a plain indication of an intent that the general act shall repeal the special act, the special act will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly, so that the two are to be deemed to stand together, one as the general law of the land, and the other as the law of the particular case. (Emphasis added.) 50 Am. Jur., Statutes, Sec. 56A.

VI. CONCLUSION

1. In the introduction, I said the question to be examined was not an easy one. It should be said again. However, I believe the foregoing examination of the authorities and opinions provide several salient points on which the Agency can build a legal position.

2. First, there emerges the clear picture that notwithstanding whether a court would find the Agency's policy legal or illegal, the policy has evolved carefully and methodically over the years only after thorough examination of the liabilities. It has also moved from one position to another only after consultation with those agencies whose jurisdictional interests might be affected -- the Commission, GAO, etc. On balance this Office has taken the position that the Pay Act of 1945 probably does not apply to the Agency and that while the "policy" is legally correct, if it were challenged in a suit, it possibly could be found to be illegal. Because of this position, it has been suggested that this Office has failed to provide clean-cut legal guidance along the way. I take exception to such a suggestion. Clear and direct statutes can be found by the judiciary to be illegal and the authorities and their relationships that we have examined in providing legal guidance on this question are far from clear and direct.

3. A second point which emerges is that competent legal authorities within the Civil Service Commission and GAO apparently have shared our position. The Chairman's letter discussed supra is strong evidence of this. Recently, additional evidence came to light when I, and another attorney within the Office, received calls from the Commission's legal office concerning

the possibility the FLSA does not apply to the Agency. These questions were predicated on the general versus special statute concept. I am advised the Office of Personnel has discussed with their counterparts at the Commission the possibility of an exemption for the Agency and received an unfavorable response, at least as to the Act's applicability. Yet, as late as mid-September a member of the Commission's legal staff advised me the Commission would be receptive to a request for an exemption, both as to overtime and to age discrimination.

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FOIAB5 4. [redacted] Then it was exempted by statute from the Classification Act. Subsequent to that, it was exempted from the Civil Service Commission's Regulations promulgated under the Pay Act but only from those titles relating to overtime and holiday and night pay. The original Pay Act had six titles with titles II and III (now codified generally at 5 U.S.C.A. 5541-5550) dealing with overtime, holiday and night pay. Section 8 of the CIA Act of 1949 speaks to the concept of "personal services" and the Act viewed as a specific statute, can be said to obviate those titles of the Pay Act, a general statute which is, in part, inconsistent. Accordingly, I believe that titles II and III of the Pay Act of 1945, as amended, are not, as a matter of law, applicable to the Agency. With respect to title VI relating to establishing basic, administrative workweeks, the legal position is not quite as positive. It may be argued that many of the considerations which result in the holding on overtime, holiday and night pay are equally applicable to title VI and accordingly, the Agency may exercise some flexibility in this area. However, because its legal position on this issue is less settled than on the overtime issue, I would urge that the Agency deviate from the standard, basic workweek concept applicable to other Government employees only after careful review and primarily, only in those areas involving the Agency's peculiar activities.

5. Thus, the Commission was correct in excluding Agency employees from the premium pay provisions of the pay regulations and not from the regulation in its entirety. In conclusion, it is the position of the undersigned that the Agency, as a matter of law, is not required to follow the provisions of titles II and III of the Federal Employees Pay Act of 1945 and that we can continue to administer our pay system with flexibility.

25X1A

[redacted]
Assistant General Counsel

ATTACHMENT #4

15 JUL 1975

MEMORANDUM FOR: William E. Colby, Director of Central Intelligence

SUBJECT : Administrative Practices in the CIA

1. There are administrative practices in the CIA which I believe are in violation of Federal laws or regulations, or are unconscionable. I have attempted to secure corrections of these practices through administrative channels without success.

2. I have, therefore, written this report.

3. I am the Chief of the Position Management and Compensation Division, a position I have held for approximately eight years. I have worked in this division and predecessor organizations for over twenty years. I am familiar with position grading actions that have taken place over this time which have resulted in improper escalation of the grade and pay structure. Many of the upgrading actions were ordered by administrative officials with full knowledge of the facts and over objections of the Position Management organization. I believe there is a serious question as to the validity of these levels.

4. There is present interest in decentralization of position classification functions, which would permit a still greater escalation of the grade and pay structure. I believe that action should be taken to prevent such decentralization and to correct present errors.

5. The overtime regulations of this Agency, established in 1962, are, I believe, in violation of Federal law. I attempted to correct these regulations by a report I submitted through administrative channels on June 6, 1974. Nothing has been done.

6. The independent contracting system in the Agency, I believe, is a further violation of law. The practice this Agency follows is inconsistent with that followed in other agencies and inconsistent with the duties of many such independent contractors.

7. I have not taken this course of writing you directly without long and careful thought. I have become convinced, over many years, that no improvement and no correction of errors will ever take place without direction from the top.

STATINTL

Chief
Position Management & Compensation Division

Attachment

STATINTL

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Remarks:

Mr. Colby:

The reason this was not forwarded immediately to you was because John McMahon and I consulted and decided that due to the highly technical nature of some of [redacted]'s allegations, you should have the benefit of DDA and D/Pers comment before reacting to his memo.

[redacted]

09/02/75

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16 July

Date

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